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# **Does the Privatization of Publicly Owned Infrastructure Implicate the Public Trust Doctrine? *Illinois Central* and the Chicago Parking Meter Concession Agreement**

Ivan Kaplan<sup>\*</sup>

## ABSTRACT

*During the nineteenth century, legislatures proved “excessively generous” in granting railroad corporations property rights in publicly owned, commercially vital municipal streets and harbors. Jacksonian jurists, suspicious of corporate influence, invoked the public trust doctrine to rescind grants of privilege inconsistent with the public interest. In Illinois Central Railroad Co. v. Illinois, the “lodestar” of the modern doctrine, the Supreme Court refused to recognize the Illinois legislature’s authority to convey the submerged lands of the Chicago Harbor to a railroad corporation, a conveyance that empowered a private enterprise to “practically control . . . for its own profit” a publicly owned “highway” vital to Chicago’s “vast and constantly increasing commerce.”*

*During the latter half of the twentieth century, courts seized on Illinois Central as a useful tool for protecting environmentally sensitive waterways while generally ignoring a century of caselaw applying the public trust doctrine to non-submerged infrastructure, namely municipal streets. The latent potential of the doctrine to protect public infrastructure from corporate monopolization remains relevant because private investors are increasingly pursuing property rights in such assets. A prominent example is the Chicago parking meter privatization, conveying to a Morgan Stanley subsidiary the rights to all on-street parking meter revenues for seventy-five years.*

*This Note analyzes the Chicago parking meter privatization under Illinois Central, and subsequent Illinois public trust caselaw, and concludes that the agreement represents precisely the sort of conveyance the Illinois Central Court sought to proscribe, namely, one that sacrifices public “management and control”<sup>1</sup> of a highway “for commerce, trade, and intercourse”<sup>2</sup> essential to Chicago’s continued economic and urban development. In the absence of judicial intervention, shortsighted state and local governments will continue to succumb to the temptation of selling rights in vital public infrastructure for temporary, short-term profit, in opaque, potentially corrupt transactions, sacrificing the ability of future generations to regulate as public necessity, safety, and welfare require.*

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<sup>1</sup> Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 453 (1892).

<sup>2</sup> *Id.* at 528.

## INTRODUCTION

During the nineteenth century, railroad corporations fought aggressively to acquire property rights in the public streets and harbors of America's burgeoning metropolises.<sup>3</sup> Legislators, whether shortsighted, incompetent, or corrupt, proved "excessive[ly] generous" in granting private parties rights in such assets.<sup>4</sup> Responsibility for protecting the *jus publicum*, or public interest, thus devolved to the courts, which invoked the concept of the public trust to invalidate grants of invaluable public property. Most prominently, in *Illinois Central Railroad Company v. Illinois*, the "lodestar" of modern public trust jurisprudence, the United States Supreme Court invalidated the Lake Front Act of 1869, conveying the submerged lands of the Chicago Harbor to the Illinois Central Railroad.<sup>5</sup> Though the legislature sought to protect the public interest by significantly conditioning the grant and extracting substantial consideration from the railroad, the Court found the legislature exceeded its authority by abdicating "management and control"<sup>6</sup> over a publicly owned asset essential to the city's "vast and constantly increasing commerce."<sup>7</sup> Concurrently, courts of final appeal in New England and Mid-Atlantic and Southern states, employing public trust principles, found that their legislatures exceeded their constitutional authorities by conveying property rights in commercially vital municipal streets to private, for-profit railroads.<sup>8</sup> The public trust doctrine, as conceived in *Illinois Central* and applied by late nineteenth- and early twentieth-century courts, thus proscribed "what today would be called rent-seeking behavior: a small, well-organized private interest procur[ing] legislation that gave it monopoly privileges in order to extract wealth from the diffuse and unrepresented public."<sup>9</sup>

Today, the doctrine is virtually unrecognizable from this early conception. In 1970, Professor Joseph Sax published a transformative law review article in which he argued, "Of all the concepts known to American law, only the public trust doctrine seems to have

<sup>3</sup> See MOLLY SELVIN, THIS TENDER AND DELICATE BUSINESS: THE PUBLIC TRUST DOCTRINE IN AMERICAN LAW AND ECONOMIC POLICY, 1789–1920 107–16 (Harold Hyman et al. eds., 1987); see also Joseph D. Kearney & Thomas W. Merrill, *The Origins of the American Public Trust Doctrine: What Really Happened in Illinois Central*, 71 U. CHI. L. REV. 799 (2004) (detailing the efforts of the Illinois Central Railroad Company to acquire the submerged lands of the Chicago Harbor).

<sup>4</sup> Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 489 (1970); see also Selvin, *supra* note 3, at 107–16.

<sup>5</sup> *Ill. Cent. R.R. Co.*, 146 U.S. 387; see, e.g., Sax, *supra* note 4, at 489 (describing *Illinois Central* as the "lodestar" American public trust decision, a description that has been explicitly adopted by various courts); see also *Owsich v. State Guide, Licensing, and Control Bd.*, 763 P.2d 488, 496 (Alaska 1988) (citing the "lodestar of American public trust law, *Illinois Central*"); *Wade v. Kramer*, 459 N.E.2d 1025, 1027 (Ill. App. Ct. 1984) (noting that the "lodestar" of the public trust doctrine in American law is *Illinois Central*); *City of Berkeley v. Super. Ct. of Alameda County*, 606 P.2d 362, 365 (Cal. 1980) (describing *Illinois Central* as a seminal case); *In re Water Use Permit Applications (Waiahole Ditch)*, 9 P.3d 409, 440 (Haw. 2000) (describing *Illinois Central* as a seminal case); *Kootenai Envtl. Alliance v. Panhandle Yacht Club, Inc.*, 671 P.2d 1085, 1088 (Idaho 1983) (describing *Illinois Central* as a seminal case).

<sup>6</sup> *Ill. Cent. R.R. Co.*, 146 U.S. at 453.

<sup>7</sup> *Id.* at 454.

<sup>8</sup> See, e.g., *Story v. N.Y. Elevated R.R. Co.*, 90 N.Y. 122 (N.Y. Sup. Ct. 1882); *Lahr v. Metro. Elevated Ry. Co.*, 10 N.E. 528 (N.Y. 1887); *Pa. R.R. Co. v. Miller*, 132 U.S. 75 (1889); *Jones v. Erie and Wyo. Valley R.R. Co.*, 25 A. 134 (Pa. 1892); *Griffin v. Shreveport and Ark. RR. Co.*, 6 So. 624 (La. 1889); *Costigan v. Pa. R.R. Co.*, 23 A. 810 (N.J. 1892).

<sup>9</sup> Kearney & Merrill, *supra* note 3, at 805.

the breadth and substantive content that might make it useful as a tool . . . [for addressing natural] resource management problems.”<sup>10</sup> In the decades since, courts have proved receptive to this charge, overwhelmingly construing the doctrine as natural resources law.<sup>11</sup> Whereas *Illinois Central* sought to protect a navigable, commercially vital, municipal harbor from corporate monopolization, courts have since expanded the doctrine to encompass commercially insignificant, nonnavigable waterways, and environmental, scenic, and recreational interests.<sup>12</sup> In thus construing the doctrine, courts have generally ignored, without specifically rejecting, a body of caselaw, beginning in the mid-nineteenth century and continuing into the twentieth, invoking the doctrine to protect the public character of municipal streets.<sup>13</sup>

The latent potential of the doctrine to proscribe economically destructive or monopolistic control of vital public infrastructure, as demonstrated in *Illinois Central*, remains relevant because “small, well-organized private [parties]” are increasingly pursuing ownership interests in public streets, highways, and harbors:

Reeling from more exotic investments that imploded during the credit crisis, Kohlberg Kravis Roberts, the Carlyle Group, Goldman Sachs, Morgan Stanley and Credit Suisse are among the investors who have amassed an estimated \$250 billion war chest—much of it raised in the last two years—to finance a tidal wave of infrastructure projects in the United States and overseas.<sup>14</sup>

[B]anks and private investment firms have fallen in love with public infrastructure. They're smitten by the rich cash flows that roads, bridges, airports, parking garages, and shipping ports generate—and the monopolistic advantages that keep those cash flows as steady as a beating heart.<sup>15</sup>

While the private sector scours for infrastructure investments, states and municipalities struggle to balance budgets ravaged by “the steepest decline in state tax

<sup>10</sup> See Sax, *supra* note 4, at 474, 489–90 (arguing *Illinois Central* contains “the central substantive thought” of public trust litigation).

<sup>11</sup> See generally THOMAS MERRILL & HENRY SMITH, PROPERTY: PRINCIPLES AND POLICIES 332 (2007); CHRISTINE KLEIN ET AL., NATURAL RESOURCES LAW: A PLACE-BASED BOOK OF PROBLEMS AND CASES 618 (2nd ed. 2009).

<sup>12</sup> See, e.g., KLEIN ET AL., *supra* note 11, at 618–78.

<sup>13</sup> See *infra* text accompanying note 150.

<sup>14</sup> Jenny Anderson, *Cities Debate Privatizing Public Infrastructure*, N.Y. TIMES, Aug. 26, 2008, [www.nytimes.com/2008/08/27/business/27fund.html](http://www.nytimes.com/2008/08/27/business/27fund.html).

<sup>15</sup> Emily Thornton, *Roads To Riches: Why Investors Are Clamoring to Take Over America's Highways, Bridges, and Airports—And Why the Public Should Be Nervous*, BUSINESSWEEK, May 7, 2007, [www.businessweek.com/magazine/content/07\\_19/b4033001.htm](http://www.businessweek.com/magazine/content/07_19/b4033001.htm). In such transactions, the private investor pays the owner, whether a state, municipality, or other public entity, a single, upfront fee, which amounts to essentially the asset’s sale price. In return, the state forfeits its rights to revenues derived from the publicly owned, now encumbered asset, and agrees to compensate the investor for actions that impair its profitability. Such investments differ markedly from mere operating agreements in which the state outsources a traditionally public service to a private concessionaire. In such transactions, the state pays the private party, not vice-versa; retaining the concessionaire only for his services, the state maintains regulatory control over the publicly owned property. Conversely, in infrastructure investment transactions, the investor, as de facto owner, generally hires his own concessionaire to operate and maintain the asset.

receipts on record.”<sup>16</sup> In the wake of the financial crisis, “[s]tates will continue to struggle to find the revenue needed to support critical public services . . . for a number of years.”<sup>17</sup> Amidst such uncertainty, the municipal bond market has demanded substantial premiums for accepting the risk of lending to struggling state and local governments, exacerbating their precarious financial positions. In fact, the crisis is motivating speculation of an impending “tsunami of municipal bankruptcies and defaults.”<sup>18</sup> As a consequence, states and municipal governments confront the overwhelming temptation of entering into privatization agreements with Wall Street institutions “in order to receive large, upfront payments that solve short-term financial problems . . . .”<sup>19</sup> Ironically, the financial crisis that precipitated these unprecedented reductions in tax revenues, motivating states and municipalities to explore infrastructure privatization, was “caused by widespread failures in government regulation, corporate mismanagement and heedless risk-taking by Wall Street.”<sup>20</sup>

Under Mayor Richard Daley, the City of Chicago pioneered municipal infrastructure privatization.<sup>21</sup> In 2005, the city leased the Chicago Skyway, a 7.8-mile city-owned expressway, for ninety-nine years to private investors for \$1.83 billion.<sup>22</sup> In 2006, the city leased four city-owned parking garages, partially beneath public streets, for ninety-nine years to Morgan Stanley for \$563 million.<sup>23</sup> In 2008, the City Council approved a ninety-nine year lease of city-owned Midway Airport to a private consortium for \$2.5 billion.<sup>24</sup>

Most recently, the city entered into a seventy-five-year non-possessory lease and license conveying an exclusive right to revenues from 36,161 city-owned on-street

<sup>16</sup> Nicholas Johnson et al., *State Tax Changes in Response to the Recession*, CTR. ON BUDGET POLICIES & PRIORITIES (Mar. 8, 2010), [www.cbpp.org/files/3-8-10sfp.pdf](http://www.cbpp.org/files/3-8-10sfp.pdf).

<sup>17</sup> Elizabeth McNichol et al., *States Continue to Feel Recession's Impact*, CTR. ON BUDGET POLICIES & PRIORITIES (Feb. 11, 2011), [www.cbpp.org/cms/?fa=view&id=711](http://www.cbpp.org/cms/?fa=view&id=711).

<sup>18</sup> See, e.g., David Wessel, *Local Debts Defy Easy Solution*, WALL ST. J., Sept. 23, 2010, <http://online.wsj.com/article/SB10001424052748704814204575507842266619222.html> (acknowledging, but ultimately dismissing, such predictions).

<sup>19</sup> *Report of Inspector General's Findings and Recommendations: An Analysis of the Lease of the City's Parking Meters*, OFF. OF THE INSPECTOR GEN. OF THE CITY OF CHICAGO, 2 (June 2, 2009), [www.chicagoinspectorgeneral.org/pdf/IGO-CMPS-20090602.pdf](http://www.chicagoinspectorgeneral.org/pdf/IGO-CMPS-20090602.pdf) [hereinafter *Report of Inspector General*].

<sup>20</sup> Sewell Chan, *Financial Crisis Was Avoidable, Inquiry Finds*, N.Y. TIMES, Jan. 25, 2011, [www.nytimes.com/2011/01/26/business/economy/26inquiry.html](http://www.nytimes.com/2011/01/26/business/economy/26inquiry.html).

<sup>21</sup> See, e.g., Mick Dumke, *Mayor Daley Pitches Chicago in Asia, but Who Is Buying?*, N.Y. TIMES, Nov. 13, 2010, [www.nytimes.com/2010/11/14/us/14cncpulse.html](http://www.nytimes.com/2010/11/14/us/14cncpulse.html). In fact, the former chief financial officer for the City of Chicago, Dana R. Levenson, is “one of the movement’s biggest champions.” Thornton, *supra* note 15. Prior to serving as Chicago’s CFO, he worked as an investment banker for Banc One and Bank of America. Upon leaving the city’s employ, he accepted a position as a managing director for Royal Bank of Scotland Group, where “he now beats the bushes for infrastructure deals.” *Id.*

<sup>22</sup> *Richard M. Daley's 22 Years as Mayor*, CHI. TRIB., Apr. 30, 2011, <http://www.chicagotribune.com/news/local/ct-met-daley-timeline-special-section20110430,0,870437.story?page=1>.

<sup>23</sup> Yvette Shields, *Chicago Approves Garage Deal: \$563M Lease Sparks Threat of Injunction*, THE BOND BUYER, Nov. 2, 2006, <http://www.bondbuyer.com/news/-258093-1.html>.

<sup>24</sup> Paul Merrion, *Midway Airport Privatization in Holding Pattern*, CHI. BUS., Feb. 1, 2010, <http://www.chicagobusiness.com/article/20100201/NEWS02/200036929>. While the city council approved the transaction, the buyer’s financing collapsed in the wake of the financial crisis, and thus, the airport remains under municipal control. *Id.*

metered parking and garage spaces to Chicago Parking Meters, LLC, a subsidiary of investment bank Morgan Stanley.<sup>25</sup> In return, the city received a single, upfront payment of \$1.15 billion.<sup>26</sup> The grant, codified in the Chicago Parking Meter System Concession Agreement (“Concession Agreement”),<sup>27</sup> requires the city to compensate Morgan Stanley for “any action or actions at any time” which materially affect the market value of Morgan Stanley’s interest, including the exercise of the city’s “reserved powers” to regulate the public rights-of-way as public necessity, safety, and welfare require.<sup>28</sup>

At the time of its enactment, the Chicago Parking Meter privatization was unprecedented among U.S. cities. In the fall of 2010, however, the Indianapolis City Council approved a fifty year, \$620 million lease of the city’s parking meters to private investors.<sup>29</sup> Recently, New York City solicited parking meter privatization proposals

<sup>25</sup> See J. OF THE PROC. OF THE CITY COUNCIL OF THE CITY OF CHIC., ILL., Dec. 4, 2008, [www.chicityclerk.com/journals/2008/dec4\\_2008/120408\\_SP.pdf](http://www.chicityclerk.com/journals/2008/dec4_2008/120408_SP.pdf) [hereinafter J. OF THE PROC. OF THE CITY COUNCIL]. The agreement conveyed a grant from the city for the right to “operate, maintain and improve the Metered Parking System, [and] to retain the revenues to be derived from the operation of the Concession Metered Parking Spaces.” *Id.* at 50527. While the contract consists of both a “non-possessory lease” and a “license,” Morgan Stanley, in its own financial statements, refers to the Concession Agreement as a “lease.” Specifically, the 2009 audited financial statements state, “[Morgan Stanley] leased the System for a 75-year term from the City of Chicago . . . for a purchase price of \$1,151,355,186.” Chicago Parking Meters, LLC, *Financial Statements and Schedule*, Feb. 28, 2010, at 6, available at [www.cityofchicago.org/content/dam/city/depts/fin/supp\\_info/AssetLeaseAgreements/MeteredParking/ParkingMetersLLCFinancialStatement2010.pdf](http://www.cityofchicago.org/content/dam/city/depts/fin/supp_info/AssetLeaseAgreements/MeteredParking/ParkingMetersLLCFinancialStatement2010.pdf).

<sup>26</sup> See J. OF THE PROC. OF THE CITY COUNCIL, *supra* note 25, at 50508.

<sup>27</sup> Dan Mihalopoulos & Hal Dardick, *Aldermen Approve Chicago Parking Meter Lease*, CHI. TRIB. (Dec. 4, 2008, 11:45 AM), [newsblogs.chicagotribune.com/clout\\_st/2008/12/aldermen-deba-1.html](http://newsblogs.chicagotribune.com/clout_st/2008/12/aldermen-deba-1.html); see also J. OF THE PROC. OF THE CITY COUNCIL, *supra* note 25, at 50527.

<sup>28</sup> This proposition is derived from the Concession Agreement’s definition of: Adverse Action (“An ‘Adverse Action’ shall occur if the City . . . takes any action or actions at any time during the Term (including enacting any Law) and the effect of such action or actions, individually or in the aggregate, is reasonably expected (i) to be principally borne by the Concessionaire or other operators of on-street metered parking systems and (ii) to have a material adverse effect on the fair market value of the Concessionaire Interest . . .”), J. OF THE PROC. OF THE CITY COUNCIL, *supra* note 25, at 50618–19; Compensation Event (“‘Compensation Event’ means . . . the occurrence of an Adverse Action or the occurrence of any other event that under the terms of this Agreement explicitly requires the payment of Concession Compensation”), *Id.* at 50533; Concession Compensation (“‘Concession Compensation’ means compensation payable by the City to the Concessionaire in order to restore the Concessionaire to same economic position the Concessionaire would have enjoyed if the applicable Compensation Event had not occurred”), *id.*; Reserved Powers (“‘Reserved Powers’ means the exercise by the City of . . . police and regulatory powers with respect to Metered Parking Spaces”), *id.* at 50549; and Reserved Powers Adverse Action Compensation (“[T]here may be circumstances when the exercise by the City of its Reserved Powers may have a material adverse effect on the fair market value of the Concessionaire Interest . . . and that under such circumstances the Concessionaire may seek compensation with respect thereto (the ‘Reserved Powers Adverse Action Compensation’)”), *id.* at 50621. For more complete definitions of these provisions, see *infra* Appendix.

<sup>29</sup> Caitlin Devitt, *Indianapolis Plan to Lease City’s Parking Meters Wins Approval*, AM. BANKER, Nov. 17, 2010, at 28. Also in fall 2010, the Pittsburgh City Council considered, but ultimately rejected, a \$451 million parking meter privatization proposed by investment bank J.P. Morgan. Kris B. Mamula, *Pittsburgh Considers New Parking Plan*, PITTSBURGH BUS. TIMES, Dec. 28, 2010, [www.bizjournals.com/pittsburgh/news/2010/12/28/pittsburgh-considers-new-parking-plan.html](http://www.bizjournals.com/pittsburgh/news/2010/12/28/pittsburgh-considers-new-parking-plan.html).

from investment banks, hoping to net \$5 billion.<sup>30</sup> Washington, D.C. is reportedly following suit.<sup>31</sup>

This Note analyzes the Parking Meter Concession Agreement under the public trust doctrine, as articulated in *Illinois Central* and modern Illinois code and caselaw. Parts I and II review, respectively, the *Illinois Central* dispute and decision and the Concession Agreement's substantive provisions and process of enactment. Part III analyzes the validity of the Concession Agreement under *Illinois Central*.<sup>32</sup> On the surface, such an analysis may seem absurd; today, courts overwhelmingly apply *Illinois Central* to submerged lands, not municipal streets. To this end, subpart III(A) surveys the history of the doctrine in Roman, English, and early American law, demonstrating its historical application to municipal streets and placing the Court's 1892 *Illinois Central* opinion in context. Subpart III(B) analyzes the language of the opinion for evidence of this history, demonstrating the Court contemplated a rule applicable not only to Chicago's municipal harbor but to the city's "streets, alleys, [and] ways." Having established the Court-considered municipal streets in Illinois public trust property, subpart III(C) analyzes the Concession Agreement under the rules governing the disposition of such property announced in *Illinois Central*, ultimately concluding that the conveyance violates the fundamental policy principles motivating the Court.

In Part IV, the Note transitions from a discussion of *Illinois Central* to the practical application of the public trust doctrine to the Concession Agreement litigation. The analysis begins by noting that the Concession Agreement itself specifically acknowledges that the city administers Chicago's public ways in accordance with the public trust doctrine.<sup>33</sup> This provision is consistent with the Illinois Plat Act, which states that municipal streets are held in public trust.<sup>34</sup> The analysis continues by applying modern Illinois public trust law to the Concession Agreement, including a 1993 decision in which the Illinois Supreme Court prohibited municipalities from exercising "proprietary powers" over public streets, "rent[ing] or leas[ing] parts, or all, of a public street," or using "public streets [primarily] as revenue-producing property. . . ."<sup>35</sup>

## I. AN INTRODUCTION TO *ILLINOIS CENTRAL*

In his seminal article on the American public trust doctrine, Professor Joseph Sax writes that *Illinois Central* contains the "central substantive thought of public trust

<sup>30</sup> See Andrew Grossman, *City on the Prowl for Cash*, WALL ST. J., Feb. 25, 2011, at A17; David Seifman, *City Mulls \$5b Meter Sell-off*, N.Y. POST, Oct. 4, 2010, [www.nypost.com/p/news/local/city\\_mulls\\_meter\\_sell\\_off\\_53FEAGOGzvBfxQuXDs5JZL](http://www.nypost.com/p/news/local/city_mulls_meter_sell_off_53FEAGOGzvBfxQuXDs5JZL).

<sup>31</sup> See Michael Neibauer, *A New Direction for D.C.'s Parking Meters?*, WASH. BUS. J., Dec. 14, 2010, [www.bizjournals.com/washington/blog/2010/12/a-new-direction-for-dcs-parking.html](http://www.bizjournals.com/washington/blog/2010/12/a-new-direction-for-dcs-parking.html).

<sup>32</sup> The public trust doctrine undoubtedly imposes prohibitions applicable to all states; nonetheless, the doctrine is generally construed as state law. See MERRILL & SMITH, *supra* note 11, at 323. ("Justice Field never says whether he is applying federal law or state law in *Illinois Central*. In subsequent public trust decisions, the Supreme Court has consistently maintained that the doctrine is grounded in state law . . . . [But] there have been recurrent attempts to argue that the trust is in fact grounded in federal law.") *Id.* For the purposes of this Note, however, this discussion is irrelevant; regardless of whether *Illinois Central* applies federal or state law, the opinion is binding upon Illinois.

<sup>33</sup> See J. OF THE PROC. OF THE CITY COUNCIL, *supra* note 25, at 50576.

<sup>34</sup> Plat Act, 765 ILL. COMP. STAT. 205/3 (West 2010).

<sup>35</sup> See AT&T Co. v. Arlington Heights, 620 N.E.2d 1040, 1049, 1044, 1047 (Ill. 1993).

litigation.”<sup>36</sup> Likewise, Professors Joseph Kearney and Thomas Merrill note in their influential study of *Illinois Central*, “[a]lthough proponents and detractors of the public trust doctrine dispute much, all agree that the leading case establishing the doctrine in the United States—the ‘lodestar’ of the modern public trust doctrine—is the United States Supreme Court’s 1892 decision in *Illinois Central Railroad Company v. Illinois*.”<sup>37</sup>

### A. Facts

Reviewing the facts underlying the *Illinois Central* dispute is essential to understanding the Court’s *Illinois Central* decision because “the facts of the case—or at least highly stylized versions of them—have been repeatedly invoked in modern cases and commentary as a justification for the very existence of the public trust doctrine.”<sup>38</sup> As presented by commentators, and as evidenced in Justice Field’s opinion, “Those facts assume the form of a classical cautionary tale: a corrupt, or at least exceedingly short-sighted, legislature transferred invaluable natural resources to a small but influential interest group, with no identifiable benefit to the public at large.”<sup>39</sup> As Professors Merrill and Kearney discovered in their investigation, however, this caricature lacks the nuance and complexity of reality.

In 1869, the Illinois legislature enacted the Lake Front Act conveying to the Illinois Central Railroad the fee simple title to “something more than a thousand acres” of submerged lands within the Chicago Harbor<sup>40</sup> and several acres of non-submerged land in north Lake Park,<sup>41</sup> consisting of contemporary Millennium Park.<sup>42</sup> In return, the Act required the railroad to remit \$800,000 for north Lake Park and seven percent of gross receipts from any leases in the harbor in perpetuity for the submerged lands.<sup>43</sup> In addition, the railroad agreed to build a breakwater, a capital-intensive infrastructure improvement beyond the city’s means.<sup>44</sup>

The submerged lands conveyed in the Lake Front Act were undeveloped and idle. In 1869, the city’s bustling commercial port facilities were not in the Chicago Harbor, but on the Chicago River;<sup>45</sup> the conveyance codified in the Act, however, excluded “the entirety of the existing harbor facilities located along the Chicago River.”<sup>46</sup> Accordingly, “[t]he Lake Front Act did not create a giant monopoly” over the city’s commercial port facilities;<sup>47</sup> rather, the Act empowered the Illinois Central Railroad to dictate, and potentially delay, development of a proposed port in the Chicago Harbor, which was intended to ease congestion on the Chicago River. The north Lake Park property conveyed by the Lake Front Act was equally idle; the property was “almost useless as a pleasure-ground. In fact its only public utility ha[d] been that of a dumping-place for

<sup>36</sup> Joseph L. Sax, *supra* note 4, at 490.

<sup>37</sup> Kearney & Merrill, *supra* note 3, at 800.

<sup>38</sup> Kearney & Merrill, *supra* note 3, at 803.

<sup>39</sup> *Id.*

<sup>40</sup> *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 454 (1892).

<sup>41</sup> Kearney & Merrill, *supra* note 3, at 801.

<sup>42</sup> *Id.* at 900.

<sup>43</sup> *Id.* at 809 n.45.

<sup>44</sup> *Id.* at 819–20.

<sup>45</sup> *Id.* at 881.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*



cellar excavations, street-sweepings, coal-ashes and other refuse material.”<sup>48</sup> Nonetheless, by virtue of its location, the property commanded a substantial price.<sup>49</sup>

In selling the submerged lands of the Chicago Harbor and the pleasure grounds of north Lake Park, the legislature sought to protect the public interest by reserving for the state specific rights in the conveyed properties. For instance, the Act provided “nothing herein contained shall authorize obstructions to the Chicago Harbor, or impair the public right of navigation,”<sup>50</sup> significantly qualifying the railroad’s right to exclude. Moreover, the Act reserved for the state the right to regulate rates charged by Illinois Central Railroad for the use of harbor facilities,<sup>51</sup> a reservation which effectively undermined Illinois Central’s ability to extract monopoly profits. Finally, the Act prohibited Illinois Central from granting, selling or conveying, in perpetuity, the submerged lands of the Chicago Harbor, further qualifying the railroad’s property rights.<sup>52</sup> Such qualifications, intended to protect the state’s interests, motivated the *Illinois Central* dissent, which argued, “the Lake Front Act had prohibited the railroad from interfering with the public right of navigation and had preserved the power of the State to regulate the railroad’s construction of improvements in the harbor.”<sup>53</sup>

Despite the legislature’s efforts to retain some semblance of regulatory control over the conveyed properties, the citizens of Chicago overwhelmingly opposed the Lake Front Act, popularly dubbed the “Lake Front Steal.”<sup>54</sup> The *Chicago Tribune*, for instance, warned of invaluable public property “pass[ing] into the hands of a Wall [S]treet corporation.”<sup>55</sup> Newspapers “saw the matter largely as a question of the adequacy of the consideration”<sup>56</sup> and complained that the Lake Front Act granted “valuable property, with equally valuable privileges, for a merely nominal sum.”<sup>57</sup> Echoing such concerns, Governor Palmer initially vetoed the Act, declaring:

[T]he obligations of prudence and good faith require that the [north Lake Park] property shall not be sold for less than its full market value . . . [I am] assured by the highest authorities upon the subject of the value of real estate in the city of Chicago, that the property . . . offered . . . for the sum of eight hundred thousand dollars, has a market value of two million[, six hundred thousand dollars].<sup>58</sup>

Further inflaming public opposition, the Act was subject to accusations of corruption.<sup>59</sup> Indeed, the Court obliquely referenced the dubious legislative process

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<sup>48</sup> *Id.* at 845.

<sup>49</sup> *See id.* at 846–47.

<sup>50</sup> *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 449 (1892).

<sup>51</sup> *Kearney & Merrill*, *supra* note 3, at 808.

<sup>52</sup> *Ill. Cent. R.R. Co.*, 146 U.S. at 451 (stating that “[t]he grant is accompanied with a proviso that the fee of the lands shall be held by the company in perpetuity, and that it shall not have the power to grant, sell or convey the fee thereof”).

<sup>53</sup> *Kearney & Merrill*, *supra* note 3, at 921.

<sup>54</sup> *Id.* at 854.

<sup>55</sup> *Id.* at 861 (citing *The Lake Park and Front Bills*, CHI. TRIB., Jan. 16, 1869, at 2).

<sup>56</sup> *Id.* at 866.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 873.

<sup>59</sup> *Id.* at 887–92.

noting, “The circumstances attending the passage of the [A]ct through the legislature were on the hearing the subject of much criticism.”<sup>60</sup> The accusations, however compelling, were never proven. On this question, Professors Kearny and Merrill concluded that, “although the documentary record from 1869 cannot be said definitely to establish that the Illinois Central used corrupt means to facilitate the enactment of the Lake Front Act, it probably leans in that direction.”<sup>61</sup> Nonetheless, owing to the consideration provided by the railroad and the regulatory control retained by the state, it is “abundantly clear that many if not most of those voting for the Lake Front Act sincerely perceived it to be in the general interest.”<sup>62</sup>

### *B. Holding*

In *Illinois Central*, the Supreme Court refused to recognize the legitimacy of the Lake Front Act.<sup>63</sup> First, the Court found that the state’s title to the Chicago Harbor was not absolute; rather, the state held such special lands in public trust.<sup>64</sup> Surveying state and federal opinions, the Court divined the following common law rule: “[T]he bed or soil of navigable waters is held by the people of the state in their character as sovereign *in trust* for public uses for which they are adapted.”<sup>65</sup> The Court distinguished public trust lands, alternately described as “property of a special character”<sup>66</sup> or “property in which the whole people are interested,”<sup>67</sup> from “public lands which are open to pre-emption and sale.”<sup>68</sup> Second, applying the Plat Act, the Court found the legislature lacked authority to convey north Lake Park. “By a statute of Illinois,” the Court wrote, “the making, acknowledging and recording of the plats operated to vest the title to the streets, alleys, ways and commons, and other public grounds designated on such plats, in the city, in trust for the public uses to which they were applicable.”<sup>69</sup> Strictly construing this Act, the Court concluded that the State lacked any title in north Lake Park to convey.

Under the holding of *Illinois Central*, public trust lands are not inherently inalienable. Rather, such lands are alienable if the state retains management and control over the conveyed property or conveying the property serves the public interest. Specifically, the Court held:

The trust devolving upon the state for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. The control of the state for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein,

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<sup>60</sup> Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 451 (1892).

<sup>61</sup> Kearny & Merrill, *supra* note 3, at 893.

<sup>62</sup> *Id.* at 882.

<sup>63</sup> Ill. Cent., 146 U.S. at 462–64.

<sup>64</sup> *Id.* at 454.

<sup>65</sup> *Id.* at 457–58 (emphasis added).

<sup>66</sup> *Id.* at 454.

<sup>67</sup> *Id.* at 453.

<sup>68</sup> *Id.* at 452.

<sup>69</sup> *Id.* at 462.

or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining.<sup>70</sup>

An alternative rule, the Court concluded, “would place every harbor in the country at the mercy of a majority of the legislature of the state in which the harbor is situated.”<sup>71</sup> In the Court’s judgment,

The legislation which may be needed one day for the harbor may be different from the legislation that may be required at another day. . . [I]t is vital to the public welfare that each [legislature] should be able at all times to do whatever the varying circumstances and present exigencies attending the subject may require; . . . a different result would be fraught with evil.<sup>72</sup>

Applying this rule, the Court found that the Act’s grant of submerged lands violated the public trust because the conveyance impaired the public interest. The Court described the Chicago Harbor as a “common highway[] for commerce, trade, and intercourse”<sup>73</sup> and recognized its “immense value to the people of the state of Illinois in the facilities it affords to its vast and constantly increasing commerce.”<sup>74</sup> The Act, however, “put it in the power of the [railroad] company to delay indefinitely the improvement of the harbor,”<sup>75</sup> thus undermining the state’s ability to manage and control commercially vital infrastructure in accordance with public necessity, safety, and welfare.

## II. AN INTRODUCTION TO THE CONCESSION AGREEMENT

In December 2008, the Chicago City Council enacted, and Mayor Richard Daley signed, a seventy-five-year contract conveying to Morgan Stanley the exclusive right to all revenues derived from the city’s stock of approximately 34,000 on-street metered parking spaces and 2000 city-owned garage spaces.<sup>76</sup> In return, the city received an upfront \$1.15 billion payment.<sup>77</sup> In enacting the agreement, the council bound the city to a predetermined schedule of parking meter rates through 2084,<sup>78</sup> obliging subsequent city councils to compensate Morgan Stanley for deviations which materially impair investors’ expected profits.<sup>79</sup> Similarly, the agreement obliges the city to compensate Morgan Stanley for any action that reduces investors’ expected profits beyond specified thresholds.<sup>80</sup> Though the Agreement contains a “Reserved Powers” provision, ostensibly

<sup>70</sup> *Id.* at 453.

<sup>71</sup> *Id.* at 455.

<sup>72</sup> *Id.* at 459–60.

<sup>73</sup> *Id.* at 458–59.

<sup>74</sup> *Id.* at 454.

<sup>75</sup> *Id.* at 451.

<sup>76</sup> See J. OF THE PROC. OF THE CITY COUNCIL, *supra* note 25.

<sup>77</sup> *Id.* at 50508.

<sup>78</sup> *Id.* at 50516–18.

<sup>79</sup> See *id.* at 50549 (indicating that “Reserved Powers” includes the city’s power to “establish and revise from time to time the schedule of Metered Parking Fees for the use of Metered Parking Spaces”); see also *id.* at 50621 (requiring the city to compensate Morgan Stanley for exercising its “Reserved Powers”). See generally *infra* Appendix, Use of Reserved Powers.

<sup>80</sup> See *infra* Appendix, Compensation Event.

reserving for the city the right to dictate parking meter prices and remove on-street parking spaces, the agreement also contains a “Reserved Powers Adverse Action Compensation” provision requiring compensation to Morgan Stanley for any exercise of such powers.<sup>81</sup> Indeed, according to the concessionaire’s 2010 financial statements, the City of Chicago paid Morgan Stanley \$533,330 in the first year of the lease for “changes to the system . . . which reduce[d] the company’s revenue.”<sup>82</sup>

Aldermen voted on the highly technical, 125-page, seventy-year contract only two days after Mayor Daley unveiled the proposal.<sup>83</sup> The agreement was subject to only about one hour of debate and passed by a vote of 40 to 5.<sup>84</sup> Alderman Richard Mell admitted that he and many of his colleagues did not thoroughly read the agreement: “How many of us read the stuff we do get, OK? I try to. I try to. I try to. But being realistic, being realistic, it’s like getting your insurance policy. It’s small print, OK?”<sup>85</sup> As one of only five aldermen to vote against the agreement, Leslie Hairston explained, “I don’t really know who we are dealing with. We need answers before we can vote on this.”<sup>86</sup>

Compounding the inadequacies of the legislative process, the city council began immediately appropriating Morgan Stanley’s payment, exhausting in approximately two years the “\$1.15 billion parking meter windfall that was supposed to last for 75 years.”<sup>87</sup> Significantly, the city council expended these funds not on new capital improvements, but merely to plug annual operating deficits.<sup>88</sup> In the fall 2010, Fitch ratings agency “downgraded Chicago’s bond rating, in part because the city had used money from the meter-lease to pay for operations.”<sup>89</sup>

The City of Chicago inspector general issued an analysis of the parking meter privatization in June 2009. “Conservatively,” the report concluded, the city undersold the system by \$974 million, or approximately half its value.<sup>90</sup> The inspector general concluded that the city succumbed to “[t]he temptation of entering into [the agreement] in order to receive [a] large, upfront payment[] that solve[d] short-term financial problems, without properly considering the long-term implications of the deal.”<sup>91</sup> Further, the inspector general found that the deal was “rushed through the City’s legislative body,

<sup>81</sup> See *infra* Appendix, Use of Reserved Powers.

<sup>82</sup> Chicago Parking Meters, LLC, *supra* note 25, at 8.

<sup>83</sup> See Mihalopoulos & Dardick, *supra* note 27.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> Fran Spielman, \$700 MILLION GAP | As City Faces Huge Budget Gap, Just \$180 Mil. Left of \$1.15 Bil. Meter Windfall, CHI. SUN-TIMES, July. 21, 2010, <http://www.inthepublicinterest.org/article/reserves-dwindling-city-faces-700m-budget-gap>; see also Fran Spielman, Daley’s Final Budget Sails Through the City Council, CHI. SUN-TIMES, Nov. 17, 2010, <http://www.suntimes.com/news/metro/2456862-418/mayor-budget-million-daley-chicago.html> [hereinafter *Daley’s Final Budget*]; Fran Spielman, \$587 Million Budget Deficit Awaits Rahm Emanuel, CHI. SUN-TIMES, May 6, 2011, <http://www.suntimes.com/news/politics/5222836-418/budget-deficit-awaiting-emanuel-upwards-of-587-million.html> [hereinafter *\$587 Million Budget Deficit*] (noting that Mayor Daley took “a political beating for leasing the city’s parking meters, downtown parking garages and Chicago Skyway and spending nearly all of the money those transactions generated to avoid tax increases in his last two budgets”).

<sup>88</sup> *Daley’s Final Budget*, *supra* note 87.

<sup>89</sup> *The Big Sell: Other Cities Can Learn from the Outgoing Mayor’s Experiment with Privatisation*, ECONOMIST, Sept. 18, 2010, [www.economist.com/node/17043320](http://www.economist.com/node/17043320).

<sup>90</sup> See *Report of Inspector General*, *supra* note 19, at 2.

<sup>91</sup> *Id.*

with little time to digest and analyze a complicated transaction, with limited information provided, and with little opportunity for public input and reaction.”<sup>92</sup>

The parking meter privatization has been plagued by accusations of corruption.<sup>93</sup> This suspicion is fomented in part by the inspector general’s report, indicating that the city significantly underpriced the asset. Moreover, the beneficiary of the city’s mismanagement is Morgan Stanley, for whom Mayor Daley’s nephew serves as a vice president and the firm’s Cook County lobbyist.<sup>94</sup> According to the *Chicago Sun Times*,

William Daley Jr. moved to New York two years ago for a job with Morgan Stanley, an investment giant with an appetite for the city of Chicago. Within a year, his employer signed a new deal with his uncle, Mayor Daley. Morgan Stanley got a 99-year lease to operate the city’s four underground parking garages. City Hall got an upfront payment of \$563 million—the highest offer made. Morgan Stanley hopes to strike two more deals with Mayor Daley. It’s among several bidders seeking long-term leases to run Midway Airport and oversee 36,161 parking meters.<sup>95</sup>

Further contributing to the appearance of impropriety, if not corruption, Morgan Stanley prevailed as the preferred vendor in an opaque, nonpublic process.<sup>96</sup> Nonetheless, evidence of corruption is merely circumstantial.

Incidentally, no obvious public recourse exists. Mayor Daley, the party primarily responsible for the parking meter privatization, chose not to run for reelection, perhaps in part because of its unpopularity.<sup>97</sup> Moreover, the city cannot simply rescind the contract by returning Morgan Stanley’s payment. First, the city has appropriated virtually the entire payment.<sup>98</sup> Second, the contract specifies damages in excess of funds received, namely, “the fair market value of the Concessionaire Interest” as determined by an independent appraiser.<sup>99</sup> This value includes Morgan Stanley’s expected profit, which is substantial.<sup>100</sup> With no obvious recourse, the inspector general notes that the Agreement

<sup>92</sup> *Id.*

<sup>93</sup> See, e.g., John Kass, *Potential Challenger Has Some Frightening Words for Daley*, CHI. TRIB., Aug. 21, 2010, [http://articles.chicagotribune.com/2010-08-21/news/ct-met-kass-0822-20100821\\_1\\_parking-meter-deal-street-parking-rates-challenger](http://articles.chicagotribune.com/2010-08-21/news/ct-met-kass-0822-20100821_1_parking-meter-deal-street-parking-rates-challenger).

<sup>94</sup> Tim Novak, *William Daley Jr., New York Investor*, CHI. SUN-TIMES, June 1, 2008, at A19.

<sup>95</sup> *Id.*

<sup>96</sup> Ben Joravsky & Mick Dumke, *New Evidence Suggests Chicago Leased Out Its Parking Meters for a Fraction of What They’re Worth*, CHI. READER, May 21, 2009, [www.chicagoreader.com/chicago/one-billion-dollars/Content?oid=1123046](http://www.chicagoreader.com/chicago/one-billion-dollars/Content?oid=1123046).

<sup>97</sup> Rick Pearson & Hal Dardick, *Majority Say No To Daley*, CHI. TRIB., July 18, 2010, [http://articles.chicagotribune.com/2010-07-18/news/chi-100718daley-poll\\_1\\_frequent-daley-critic-record-seventh-term-half-of-chicago-voters](http://articles.chicagotribune.com/2010-07-18/news/chi-100718daley-poll_1_frequent-daley-critic-record-seventh-term-half-of-chicago-voters) (noting that “[d]issatisfaction abounds . . . over Daley’s handling of the crime problem, his efforts to rein in government corruption and his backing of a controversial long-term parking meter system lease”). Upon retiring, Mayor Daley accepted employment with the law firm retained by Chicago to draft the Concession Agreement. Mick Dumke, *Daley Joining Law Firm He Previously Hired for City’s Meter Deal and Other Privatization Work*, CHI. READER, June 1, 2011, [www.chicagoreader.com/Bleader/archives/2011/06/01/daley-joining-law-firm-he-previously-hired-for-citys-meter-deal-and-other-privatization-work](http://www.chicagoreader.com/Bleader/archives/2011/06/01/daley-joining-law-firm-he-previously-hired-for-citys-meter-deal-and-other-privatization-work).

<sup>98</sup> \$587 Million Budget Deficit, *supra* note 87.

<sup>99</sup> J. OF THE PROC. OF THE CITY COUNCIL, *supra* note 25, at 50543.

<sup>100</sup> *Id.* Critically, the “fair market value” substantially exceeds the \$1.15 billion payment received by the city, according to the inspector general. *Report of Inspector General*, *supra* note 19, at 3; see also Darrell

“give[s] a private company control over a major public asset for three generations . . . [with] significant impact on the everyday lives of its citizens.”<sup>101</sup>

### III. *ILLINOIS CENTRAL* AND ITS IMPLICATIONS FOR THE CONCESSION AGREEMENT

This Part analyzes the Concession Agreement under the holding of *Illinois Central*. This analysis begins, in subpart III(A), by surveying the development of the public trust doctrine, demonstrating its historical application to municipal streets and placing the Court’s 1892 *Illinois Central* opinion in historical context. Subpart III(B) scrutinizes the Court’s *Illinois Central* opinion for evidence of this history, and the Court’s application of public trust principles to Chicago’s municipal streets. Subpart III(C) applies the rules governing the disposition of public trust property, announced in *Illinois Central*, to the Concession Agreement.

#### A. *The Public Trust Doctrine and Its Historical Application to Public Streets*

Today, the public trust doctrine generally, and *Illinois Central* specifically, is presumed to apply to environmentally sensitive lakes, rivers and wetlands, not city streets and alleys. Nonetheless, from its very inception, through at least the late nineteenth century, the public trust doctrine served to protect not only commercially vital waterways, but their upland equivalents, municipal streets and highways. This history informs *Illinois Central* and, thus, an understanding of this history is essential to understanding the *Illinois Central* opinion.

#### 1. Ancient and Early English Conceptions of the Public Trust Doctrine

Discussions of the history of the public trust doctrine invariably begin with the Roman Institutes of Justinian, composed in 528 A.D., which recognized a public right to “perpetual use” of “certain common properties . . . such as the seashore, *highways*, and running water.”<sup>102</sup> The Code “designated *public roads*, harbors, rivers and riverbanks as *res publicae*. These objects were considered to be the property of the Roman people and . . . were held for the free use of all.”<sup>103</sup> As *res publicae* properties, public roads were

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Preston, *A Windfall for Investors, a Loss for Chicago*, BUSINESSWEEK, Aug. 12, 2010, [http://www.businessweek.com/magazine/content/10\\_34/b4192044579970.htm](http://www.businessweek.com/magazine/content/10_34/b4192044579970.htm).

<sup>101</sup> See *Report of Inspector General*, *supra* note 19, at 2.

<sup>102</sup> Sax, *supra* note 4, at 475 (emphasis added). But see James L. Huffman, *Speaking of Inconvenient Truths—A History of the Public Trust Doctrine*, 18 DUKE ENVTL. L. & POL’Y F. 1, 1–2 (2007) (noting “a history of pervasive private ownership in both Rome and England” of state-owned waters and lands); Sax, *supra* note 4, at 475 (acknowledging the lack of a public right in Rome and England to enforce public trust protections). For our purposes, however, the relevant question is not the practical effectiveness of these ancient doctrines, but rather the degree to which they applied equally under the law to both navigable rivers and upland highways.

<sup>103</sup> SELVIN, *supra* note 3, at 17 (emphasis added). Thomas Sandars, in his definitive translation of the *Institutes of Justinian*, explains the *publicus* thusly:

The word *publicus* is sometimes used as equivalent to *communis* [i.e., air and seas], but is probably used, as here, for what belongs to the people. Things public belong to a particular people, but may be used and enjoyed by all men . . . . The particular people or nation in whose territory public things lie may permit all the world to make use of them, but exercises a special jurisdiction to prevent any one injuring them . . . . [Such properties] ‘are subject to the guardianship of the Roman people.’

afforded special protection unavailable to *agri vectigales*, or public lands available for lease, and similar state and municipal properties; such properties the state or municipality “held exactly like individuals . . . the state or corporate being looked on as any other owner.”<sup>104</sup> Thus, the Institutes of Justinian, the ancient foundation of the public trust doctrine, does not appear to discriminate, in its protection of *res publicae* property, between submerged lands, such as harbors and rivers, and their commercial non-riparian counterparts, public roads and highways.

Early English common law conceptions of the public trust “borrowed” from the Institutes of Justinian.<sup>105</sup> According to public trust scholar Professor Molly Selvin, “Those public trust rights which did exist in the corpus of [early English] common law doctrines . . . can be found in the two treatises [*De Jure Maris* and *De Portibus Maris*] of Sir Matthew Hale,” Chief Justice of the King’s Bench from 1671 until 1675.<sup>106</sup> In *De Jure Maris*, Lord Hale described the rudimentary public trust doctrine of early English common law, essentially a public easement which applied equally to upland highways and navigable rivers. Lord Hale acknowledged that the soil beneath an upland highway or a navigable river may, under the early English common law, “in point of property . . . be a private man’s freehold.”<sup>107</sup> Yet, the fee was subject to a “publick interest,” or right of passage, which may not be “prejudiced or damnified.”<sup>108</sup> This right of passage, Lord Hale concluded, applied equally to upland highways and navigable rivers

whether fresh or salt, that are a common passage, not only for ships and greater vessels, but also for smaller, as barges or boats; . . . for as the common highways on the land are for the common land passage, so these kind of rivers, whether fresh or salt, that bear boats or barges, are highways by water; and as the highways by land are called [a royal high road] so these publick rivers for publick passage are called [a royal road by water] . . . ; all things of publick safety and convenience being in a special manner under the king’s care, supervision, and protection.<sup>109</sup>

Interpreting *De Jure Maris*, Professor Selvin asserts, “As protector of the highways, public rivers, and seaports, [only] the king could order the removal of all nuisances or obstructions to the common passage in such properties . . . . Royal ownership and regulatory responsibilities, then, placed these important resources in a form of public

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THOMAS COLLETT SANDARS, THE INSTITUTES OF JUSTINIAN WITH ENGLISH INTRODUCTION, TRANSLATION AND NOTES 91 (7th ed. 1910).

<sup>104</sup> THOMAS COLLETT SANDARS, THE INSTITUTES OF JUSTINIAN WITH ENGLISH INTRODUCTION, TRANSLATION AND NOTES 160 (Chi., Callaghan & Co., 1st Am. ed. 1876), <http://www.archive.org/stream/institutesjusti00hammgoog#page/n226/mode/2up>.

<sup>105</sup> See MERRILL & SMITH, *supra* note 11, at 308 (“Bracton, writing in the mid-thirteenth century, borrowed from Justinian’s *Institutes* and claimed that at common law the sea and seashore were common to all.”).

<sup>106</sup> SELVIN, *supra* note 3, at 24; see also MERRILL & SMITH, *supra* note 11, at 309 (stating that “it was Hale’s version of English law that served as the starting point for American writers, most notably Joseph Angell and James Kent, who presented a vision of English water law as a baseline for introducing the American law on the subject”).

<sup>107</sup> STUART MOORE, A HISTORY OF THE FORESHORE AND THE LAW RELATING THERETO 405 (3d ed. 1888) (reciting DE JURE MARIS).

<sup>108</sup> *Id.* at 405.

<sup>109</sup> *Id.* at 374.

trust.”<sup>110</sup> Thus, the early English common law, as articulated by Lord Hale, mirrored the Institutes of Justinian in subjecting not only navigable submerged lands but their upland equivalents, the “common highways,” to a form of public trust protection.

## 2. Early-Nineteenth Century American Law

Beginning in the 1840s, half a century before *Illinois Central*, “state and federal courts began to formulate a large body of public trust law.”<sup>111</sup> During this period, “Courts of the Middle Atlantic [and New England regions which included the country’s largest metropolises: New York, Baltimore, Boston, and Philadelphia]”<sup>112</sup> ruled that the streets of their major cities ‘are species of property’ held in trust for the public.”<sup>113</sup> The impetus for this aggressive assertion of public rights was industrialization; namely, “[a]s railroad and shipping improved during the century, control of harbor-front property in particular and urban property in general came to mean control of the economic destiny of a particular locality.”<sup>114</sup> Foreshadowing *Illinois Central*, “[t]he overwhelming majority of trust litigation during the mid-nineteenth century in these states centered around the rights of railroads in public streets and tidal property.”<sup>115</sup>

Unlike in England, where the soil beneath public streets and navigable streams remained “in point of property . . . a private man’s freehold,” early nineteenth century states began vesting the title to soil beneath navigable waterways and upland highways in public entities, not private landowners.<sup>116</sup> In Illinois, for instance, the legislature enacted the “Plat Act,” vesting municipal streets, alleys, and ways “in the corporate name thereof *in trust* . . . .”<sup>117</sup> While affirming public ownership of soils beneath tidal lands and city

<sup>110</sup> SELVIN, *supra* note 3, at 25–26.

<sup>111</sup> *Id.* at 63.

<sup>112</sup> *See, e.g.*, U.S. BUREAU OF THE CENSUS, POPULATION OF THE 90 URBAN PLACES: 1830, [www.census.gov/population/www/documentation/twps0027/tab06.txt](http://www.census.gov/population/www/documentation/twps0027/tab06.txt).

<sup>113</sup> SELVIN, *supra* note 3, at 108.

<sup>114</sup> *Id.* at 102.

<sup>115</sup> *Id.* at 106.

<sup>116</sup> *Id.* at 107–21.

<sup>117</sup> Plat Act, 765 ILL. COMP. STAT. 205/3 (West 2010) (emphasis added). The Act remains virtually identical to the Act as amended in 1845. Today, the Act reads, “[T]he premises intended for any street, alley, way, common or other public use in any city, village or town, or addition thereto, shall be held in the corporate name thereof in trust to and for the uses and purposes set forth or intended.” *Id.* In 1845, the Act read, “And the land intended to be for streets, alleys, ways, common or other public uses, in any town or city, or addition thereto, shall be held in the corporate name thereof, in trust to, and for the uses and purposes set forth and expressed or intended.” Plat Act, Ill. Rev. Stat. ch. 25 (1845), *available at* <http://www.archive.org/stream/revisedstatuteso00illi#page/n111/mode/2up>.

During the early and mid-nineteenth century, the Illinois Supreme Court consistently affirmed the public trust obligation the Plat Act imposed on municipalities. *See, e.g.*, *Bd. of Trs. v. Haven*, 11 Ill. 554 (1850) (“A proprietor of land, who lays out the same, under our statute, into town or city lots, vests the legal title to the land embraced by streets, in the corporation of the town or city, for the use and benefit of the public. *It is a solemn dedication of the ground to the [municipal] corporation, to be held in trust for the uses and purposes of the public.*”) (emphasis added); *City v. Ill. Transp. Co.*, 12 Ill. 37, 59 (1850) (“Whatever title to these public grounds may be vested in the city, she has not the unqualified control and disposition of them. They were dedicated to the public for particular purposes, and only for such purposes can they be rightfully used. For these purposes the city may improve and control them, and adopt all needful rules and regulations for their management and use, but she can not alien[ate] or otherwise dispose of them. At most, she but holds them in trust for the benefit of the public . . . . This is not like the case of property purchased by the city for her own exclusive use, which she could dispose of at her pleasure.”); *see*



streets, mid-nineteenth century courts sanctioned the right of the state, as sovereign, to appropriate such properties as consistent with the states' trust obligations. Indeed, during this period, states' rights to dispose of public trust property, including tidal property<sup>118</sup> and public streets,<sup>119</sup> were "almost unqualifiable," "inalienable," "absolute" and "despotic."<sup>120</sup> The supreme court of Pennsylvania, for instance, claimed the fee to the soil beneath all state highways, including every "navigable stream, which is a public highway," but declared that this enviable inventory of trust resources were 'subject to [the State's] absolute discretion and control'. . . over which she holds despotic sway, the remedy for an abuse of [this power] being a change of rulers and a consequent change of the law."<sup>121</sup> In this manner, the early nineteenth century courts validated

extraordinary legislative grants of privilege to semi-public corporations, most specifically the railroad and turnpike companies. Those privileges stemmed from the basic judicial determination that the operation of railroad and turnpikes on city streets, piers, and public highways was consistent with the public trust under which the state legislatures and municipal corporations held those properties.<sup>122</sup>

Nonetheless, courts occasionally invalidated such privileges when conveyed by municipalities, which lacked a state's "despotic" sovereign power. In *Milhau v. Sharp*, for instance, the plaintiffs challenged a grant by New York City for the construction and operation of a private passenger railway on Broadway Avenue.<sup>123</sup> The New York supreme court, in an opinion upheld by the New York Court of Appeals,<sup>124</sup> concluded

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also *City of Quincy v. Jones*, 76 Ill. 231 (1875). Nonetheless, mid-nineteenth century Illinois jurists, like their New England and Mid-Atlantic contemporaries, embraced the economic potential of the iron horse and thus found the appropriation of public streets for railroad purposes consistent with public trust principles. See *Stack v. E. St. Louis*, 85 Ill. 377, 379–80 (1877).

<sup>118</sup> In *In re N.Y. Cent. & Hudson River R.R. Co.*, 77 N.Y. 248 (1879), a factual dispute similar to *Illinois Central*, the New York Court of Appeals upheld a state grant of submerged lands beneath New York Harbor to a railroad corporation. Admitting the land beneath New York Harbor "is held in trust, [and] . . . cannot be appropriated for any purposes inconsistent with such use and rights of the public in the waters," the court nonetheless concluded, "such rights are [not] invaded by an appropriation for the purposes now claimed." *Id.* at 259.

<sup>119</sup> Courts during this period overwhelmingly sanctioned the use of railroads on city streets as consistent with the public trust in which such property was held. In the most prominent Supreme Court opinion on this question during the mid-nineteenth century, *Barney v. City of Keokuk*, 94 U.S. 324 (1876), the Supreme Court acknowledged, "public authorities ought to have entire control of the great passageways of commerce and navigation, to be exercised for the public advantage and convenience." *Id.* at 338. Nonetheless, the Court concluded a state grant to several railroad corporations to operate on the streets of Keokuk, Iowa, which necessitated partially filling the Mississippi River, did not violate this principle. "Though attended with some inconveniences," the Court admitted, "[railroads] have greatly added to the efficiency of the public thoroughfares, and have more than doubled their capacity for travel and transportation." *Id.* at 341. Significantly, however, the Court mandated the removal of a freight depot, constructed "under the contract with the city," *id.* at 329, because the structure "was a total obstruction of the passage," and was thus "subversive of, and totally repugnant to, the dedication of the street, as well as to the rights of the public." *Id.* at 342.

<sup>120</sup> See SELVIN, *supra* note 3, at 116–17.

<sup>121</sup> *Phila. & Trenton R.R. Co.*, 6 Whart. 25 (Pa. 1840).

<sup>122</sup> SELVIN, *supra* note 3, at 12.

<sup>123</sup> *Milhau v. Sharp*, 15 Barb. 193 (N.Y. 1853).

<sup>124</sup> *Davis v. Mayor of N.Y.*, 14 N.Y. 506, 522 (1856).

that the city exceeded its authority by conveying public trust property to a private corporation for nominal consideration, specifically, “a trifling sum, with the right to demand five cents fare from travelers, when the trustees might have obtained a million of [sic] dollars for the grant, with a charge upon travelers of only three cents.”<sup>125</sup> The court wrote:

[The city council] is the depositary of a trust which it is bound to administer faithfully, honestly and justly. And no one will content that the body of men, who for the time being, may be its duly authorized representatives, can legally dispose of its property of great value, without any or for a nominal consideration; and if they shall presume to do so, it will be no excuse for such a gross and unwarrantable breach of trust to say that they acted in their legislative capacity; for the very simple reason that they will not act in that capacity.<sup>126</sup>

The concession at issue in *Milhau* was the right to lay track on Broadway Avenue. The city argued that the license represented merely “permission” to use the street, without granting an exclusive right of possession.<sup>127</sup> The court questioned this distinction, but ultimately dismissed the relevance of the “character” of the grant:

[I]t is immaterial what particular name is given to this thing which is thus granted. Whether it be a thing corporeal or incorporeal, or whatever be its correct legal designation, it is a species of property of some kind. It is a property held by the city, and is subject to the same trusts and duties as its other [trust] property.<sup>128</sup>

Similarly, in *Quincy v. Jones* the Illinois Supreme Court ruled that a city may not grant a non-possessory right “to the lateral support of the soil in [a] street.”<sup>129</sup> Invoking the Plat Act, the court reasoned:

It is the unquestioned duty of the city, in controlling and improving the streets, to prepare them for public use, as streets, at such time and in such manner as the public necessities may require. Holding them in trust for the public, and having no authority to convey or divert them to other uses, it

<sup>125</sup> *Milhau*, 15 Barb. at 198 (summarizing the argument of the plaintiff, with whom the court ultimately sided).

<sup>126</sup> *Id.* at 212. Foreshadowing *Illinois Central*, in which the Court reasoned, “The position advanced by the railroad company . . . would place every harbor in the country at the mercy of a majority of the legislature of the State in which the harbor is situated,” 146 U.S. at 455, the New York supreme court, half a century earlier, warned, “If a different doctrine were established, the mayor and aldermen of the city of New-York might, at the next meeting of the common council, distribute the whole of the property owned by the city among themselves, provided that they adhered to the ordinary forms of legislation.” *Milhau*, 15 Barb. at 213.

<sup>127</sup> *Milhau*, 15 Barb. at 202, 206. In support of this position, the city argued, “Every precaution was taken to prevent the rails from being felt by any vehicle passing in the street. . . . [T]he safety, health, comfort and convenience of the public were carefully attended to . . . Nor would the cars interfere with the ordinary use of the street for other vehicles.” *Id.* at 202.

<sup>128</sup> *Id.* at 214.

<sup>129</sup> 76 Ill. 231, 244 (1875).

would seem inevitably to follow that they can have no power to grant to individuals rights or easements in the street which might in any way interfere with the duty of preparing them for public use to meet the public necessities; for it is obvious that if such rights may be granted, then the practical use of the streets may become so burdened with private rights as to place it beyond the pecuniary ability of the city to discharge its duty to the public, with reference to them.<sup>130</sup>

### 3. Late Nineteenth-Century American Law

By the late nineteenth century, courts began to question states' "proclivity toward the privatization of trust resources,"<sup>131</sup> a sentiment "coincident with the prevailing popular hostilities toward railroad corporations."<sup>132</sup> As *A Treatise on the Law of Roads and Streets*—published in 1890, two years prior to Court's *Illinois Central* opinion—lamented:

It is, in truth, somewhat difficult to vindicate the doctrine that private corporations may use the streets of a city for their own benefit . . . . It is true, as history proves, that municipalities are quick to grant important privileges without restriction which they subsequently feel the necessity of limiting, but not until after it is too late, and it is undeniably true that courts have not been entirely free from the same general influence which moved the local bodies.<sup>133</sup>

In the late nineteenth century, state supreme courts, and the United States Supreme Court, began to invalidate legislative appropriations of public trust property. Prior to the Supreme Court's *Illinois Central* opinion, state supreme courts in New York, New Jersey, Pennsylvania, and Louisiana invoked public trust principles to rescind legislative grants for the construction and operation of elevated, for-profit railroads on public streets.<sup>134</sup> For instance, in New York's so-called *Elevated Rail Cases*, consisting of *Story v. N.Y. Elevated R.R. Co.* and *Lahr v. Metro. Elevated Ry. Co.*, the plaintiffs challenged the legislature's authority to grant a private corporation the right to construct and operate an "El," or elevated railroad, on the streets of New York.<sup>135</sup> The New York Court of Appeals, in language foreshadowing the Supreme Court's *Illinois Central* opinion,<sup>136</sup> found "[t]he legislature . . . had no power to authorize the street to be used for an elevated steam railroad."<sup>137</sup> While acknowledging "travel on the surface of the street would . . .

<sup>130</sup> *Id.* at 242–43.

<sup>131</sup> *See* SELVIN, *supra* note 3, at 147.

<sup>132</sup> *Id.* at 303.

<sup>133</sup> BYRON K. ELLIOTT & WILLIAM F. ELLIOTT, *A TREATISE ON THE LAW OF ROADS AND STREETS* 559–60 (1890).

<sup>134</sup> *See, e.g., Story v. N.Y. Elevated R.R. Co.* 90 N.Y. 122 (1882); *Lahr v. Metro. Elevated Ry. Co.*, 104 N.Y. 268 (1887); *Pa. R.R. Co. v. Miller*, 132 U.S. 75, 82 (1889); *Jones v. Erie & Wyo. Valley R.R. Co.*, 151 Pa. 30 (1892); *Griffin v. Shreveport & Ark. R.R. Co.*, 41 La. Ann. 808 (La. 1889); *Costigan v. Pa. R.R. Co.*, 54 N.J.L. 233 (N.J. 1892). *See generally* SELVIN, *supra* note 3, at 305–13.

<sup>135</sup> *See Story*, 90 N.Y. at 122; *Lahr*, 104 N.Y. at 268.

<sup>136</sup> *See Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 453 (1892) ("A grant of all the lands under the navigable waters of a state has never been adjudged to be within *the legislative power*." (emphasis added)).

<sup>137</sup> *See Lahr*, 104 N.Y. at 296.

still be possible,”<sup>138</sup> the grant authorized the “permanent appropriation of the street for railroad purposes, . . . a perversion of its use.”<sup>139</sup>

Pursuant to the Act of 1813, comparable to the Illinois Plat Act, New York municipalities hold title to city streets “in trust.”<sup>140</sup> The court construed the trust as a “contract written in the statute.”<sup>141</sup> Thus, the legislature could not reappropriate public streets by the mere exercise of legislative discretion.<sup>142</sup> The United States Supreme Court “explicitly affirmed”<sup>143</sup> this principle.<sup>144</sup> Applying New York law, the Court found:

The logical effect of [the *Elevated Rail Cases*] is to construe the Constitution as to operate as a restriction upon the legislative power over the public streets . . . and confine its exercise to such legislation as shall authorize their use for street purposes alone. The trust upon which streets are held is that they shall be devoted to the uses of public travel. When they, or a substantial part of them, are turned over to the exclusive use of a single person or corporation, we see no reason why a state court may not hold that it is a perversion of their legitimate uses, [and] a violation of the trust . . . .<sup>145</sup>

The consequences of the *Elevated Railroad* decisions were immense. In the wake of the *Story* decision, the New York City “El” system, operational for approximately three years, effectively ceased to function,<sup>146</sup> generating an enormous capital loss for its private investors. Moreover, the *Story* and *Lahr* decisions reverberated throughout late nineteenth-century courts. The supreme courts of Pennsylvania, Louisiana, and New Jersey subsequently imposed similar restrictions on the operation of elevated railroads.<sup>147</sup> In addition, the success of plaintiffs in challenging elevated railroads as a violation of the public trust motivated certain courts to reconsider their earlier enthusiasm for accommodating surface railroads on public streets.<sup>148</sup>

As a consequence of such decisions, by the 1890s, public streets, like state and municipal harbors, were deemed public trust property and accorded protection under the public trust doctrine. In 1897, the *American & English Encyclopedia of Law* announced, as a general principle of law not specific to any particular state, “Municipal corporations hold the title to streets, alleys, public squares, wharves, etc., in trust for the public; and upon principle, such trust property can no more be disposed of by the corporation than

<sup>138</sup> See *Story*, 90 N.Y. at 155.

<sup>139</sup> *Lahr*, 104 N.Y. at 288, 294.

<sup>140</sup> *Id.* at 268.

<sup>141</sup> See *Story*, 90 N.Y. at 177.

<sup>142</sup> *Id.*

<sup>143</sup> See SELVIN, *supra* note 3, at 310.

<sup>144</sup> See *Sauer v. City of New York*, 206 U.S. 536, 547, 554 (1907).

<sup>145</sup> *Id.*

<sup>146</sup> See SELVIN, *supra* note 3, at 309–10.

<sup>147</sup> *Id.* at 25.

<sup>148</sup> See SELVIN, *supra* note 3, at 315. Unlike the New York, Pennsylvania, New Jersey, and Louisiana courts, the Illinois Supreme Court refused to distinguish between surface and elevated lines, and thus found the latter consistent with Chicago’s public trust obligations. See *Summerfield v. Chicago*, 197 Ill. 270, 282 (1902). Critically, however, the court concluded the city council’s “object was *not to grant the railroad company additional privileges in the streets*, but to secure the[ir] elevation . . . in the interest of the safety of the public . . . and to increase the[ir] facility [for] passage . . . .” *Id.* at 285 (emphasis added).

can any other trust property held by an individual.”<sup>149</sup> Even in the absence of a specific statute qualifying the rights of state and municipal authorities, as in New York and Illinois, common law served to restrain their discretion by directly “vest[ing] the title in trust for the public.”<sup>150</sup>

### *B. Evidence of this History in Illinois Central*

Within the context of this extensive case and statutory history, the *Illinois Central* Court composed its opinion. The question thus arises: does the opinion evidence this history? An analysis of the opinion suggests the Court contemplated application of the public trust doctrine beyond submerged lands to “streets, alleys [and] ways” in Illinois.

To begin, commentators have attempted, generally unsuccessfully, to apply the holding of *Illinois Central* beyond submerged lands to upland natural resources, such as forests. Revealingly, the Court itself specifically rejects this interpretation,

[Title to lands beneath navigable waters] is a title different in character from that which the State holds in lands intended for sale. It is different from the title which the United States hold in the public lands which are open to preemption and sale. It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce

<sup>149</sup> See *Municipal Corporations*, in 1 AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW 949, 1064 (John Houston Merrill ed., 1891).

<sup>150</sup> See ELLIOTT & ELLIOTT, *supra* note 133, at 91. This discussion is intended to place the *Illinois Central* opinion in historical context, and thus terminates in the late nineteenth century. In the twentieth century, courts expanded the public trust doctrine to encompass environmentally sensitive resources, while generally ignoring, without specifically rejecting, its application to public streets. For instance, in the most significant Supreme Court public trust decision of the latter half of the twentieth century, the Court expanded the doctrine to encompass all lands under waters “subject to the ebb and flow of the tide,” regardless of whether such waters are navigable. *Phillips Petroleum Co. v. Miss.*, 484 U.S. 469, 472 (1988). *Phillips*, thus, significantly expanded the doctrine, without rejecting its earlier applications. It is worth noting that the Supreme Court, in so-called “public forum doctrine” decisions, continues to state that public streets are held in public trust. See *Hauge v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939) (“[w]herever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public”); *Frisby v. Schultz*, 487 U.S. 474, 481 (1988) (noting that “all public streets are held in the public trust”); *Int’l Soc’y for Krishna Consciousness v. Lee*, 505 U.S. 672 (1992) (noting that “all public streets are held in the public trust”). See generally Karl P. Baker & Dwight H. Merriam, *Indelible Public Interests in Property: The Public Trust and the Public Forum*, 32 B.C. ENVTL. AFF. L. REV. 275 (2005) (“While these doctrines stand on distinct historical and theoretical foundations and diverge from each other in many respects, there are important parallels between them in how they conceptualize the relationship between government’s power to regulate, control, and dispose of land it owns, and the rights belonging to what one scholar has called the ‘unorganized public’ in that same property.”). As will be discussed in Part IV, Illinois continues to apply public trust principles to non-submerged municipal property, including public streets and parks. See, e.g., *id.* at 286 (“Illinois is one of the few states to have judicially expanded the public trust doctrine to public parks.”). Unlike Illinois, the Iowa Supreme Court has specifically rejected the application of the public trust doctrine to public streets. See *Fencl v. City of Harpers Ferry*, 620 N.W.2d 808, 814 (Iowa 2000) (“We think these underpinnings of the public trust doctrine have no applicability to public streets and alleys. Simply stated, an alley is not a natural resource.”). In specifically rejecting application of the doctrine to public streets, Iowa is an exception. Moreover, unlike Illinois’s code, Iowa’s code does not contain a Plat Act vesting title to municipal streets in public trust. Iowa Code § 354.19 (2011), titled “Dedication of Land,” merely provides for “public access” to streets, whereas Illinois’s code requires that title to soil beneath municipal streets be placed in public trust.

over them, and have liberty of fishing therein freed from the obstruction or interference of private parties.<sup>151</sup>

While *Illinois Central* is self-evidently not applicable to upland natural resources, it is equally self-evident the Court contemplated application of its holding beyond submerged lands.

First, the Court referred to public trust property broadly, not narrowly in reference only to submerged lands. The Court wrote, for instance, “The State can no more abdicate its trust over property in which the whole people are interested, *like navigable waters and soils under them*, so as to leave them entirely under the use and control of private parties . . .”<sup>152</sup> Similarly, the Court wrote, “So with trusts connected with public property, or property of a special character, *like lands under navigable water*, they cannot be placed entirely beyond the direction and control of the State.”<sup>153</sup> Such passages suggest the Court perceived the soil beneath navigable waters as but one example of “property of a special character” or “trust property in which the whole people are interested.”<sup>154</sup> While Justice Field refused to catalog all public trust property, an exercise unnecessary for the disposition of the case, such language suggests the Court intended, or at least contemplated, application of its rule to “public [trust] property” of which submerged land was but one, common-law example.<sup>155</sup>

In fact, the Court specifically cited the Illinois Plat Act as an example of non-submerged public trust property. “By a statute of Illinois,” the Court wrote, “the making, acknowledging and recording of the plats operated to vest the title to the streets, alleys, ways and commons, and other public grounds designated on such plats, in the city [of Chicago], in trust for the public uses to which they were applicable.”<sup>156</sup> This discussion is remarkable for two related reasons. First, the Court explicitly acknowledged the existence of non-submerged public trust property, namely “streets, alleys [and] ways” in Illinois. Second, the statutory command contained in the Plat Act, and recited by the Court, is virtually identical to the Court’s description of the common-law public trust in submerged lands. Whereas the Court ruled that submerged land is held, under the common law, “in trust . . . for the public uses, for which it is adapted,”<sup>157</sup> the Plat Act states that streets, alleys and ways are held “in trust for the public uses to which they were applicable.”<sup>158</sup> Presumably, the Court consciously employed this parallel construction between the statute and the common-law right, suggesting the two public trusts, as conceived by the Court, were essentially equivalent.<sup>159</sup>

<sup>151</sup> Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 452 (1892).

<sup>152</sup> *Id.* at 452–53 (emphasis added).

<sup>153</sup> *Id.* at 454.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 462.

<sup>157</sup> *Id.* at 457–58.

<sup>158</sup> *Id.* at 462 (paraphrasing the Plat Act).

<sup>159</sup> The question thus arises: Why did the Court not merely cite the Plat Act to rescind the harbor grant, as opposed to invoking an expansive, ill-defined common-law principle? Quite simply, the Plat Act does not extend to wharves, harbors or other submerged property. *See* Plat Act, 765 Ill. Comp. Stat. 205/3 (West 2010). Thus, one could construe the Court’s opinion as effectively expanding upon the Plat Act, by invoking virtually identical language to bring under public trust protection the state’s interests in the submerged lands of the Chicago Harbor.

Second, *Illinois Central*'s references to navigable waters as "natural highways"<sup>160</sup> and "common highways for commerce, trade and intercourse"<sup>161</sup> further suggests the Court believed public trust principles applied to non-submerged highways. Indeed, the Court explicitly relied on Lord Hale's conception of the public trust, one conceived, as earlier discussed, on the analogy between navigable waters and upland highways, and on the assumption, under early English law, all such properties were subject to the King's protection.<sup>162</sup> The Court wrote:

In his treatise on *De Jure Maris*, Lord Hale says: The jus privatum that is acquired by the subject, either by patent or prescription, must not prejudice the jus publicum, wherewith public rivers and the arms of the seas are affected to public use; . . . The principle of the common law to which we have adverted is founded upon the most obvious principles of public policy. The sea and navigable rivers are natural highways, and injury to them is injury to commerce . . . .<sup>163</sup>

Thus, "the most obvious principles of public policy" dictated that the trust encompass not only aquatic, but upland, highways. This was precisely the effect of the Plat Act, for "[t]he word 'highway,'" according to Angell and Durfee's 1886 *A Treatise on the Highways*, "is considered as the *genus* of all public ways; So that a common *street* in any city or town, being common to all people, is a public highway."<sup>164</sup>

Finally, an earlier Supreme Court opinion suggests that Justice Field believed the public trust doctrine extended beyond submerged lands.<sup>165</sup> In *Townsend v. Greeley*, authored by Justice Field, the Court held that certain non-submerged, non-tidal lands, formerly under Mexican authority, were subject to public trust protection; the Court thus imposed restrictions on their alienability. Paraphrasing Field's opinion, Professor Selvin writes,

"It is therefore now the settled law," he wrote, that the land thus held by pueblos' towns under the Mexican government were not held by the them in absolute property but in trust for the benefit of their inhabitants and were held subject to a similar trust by municipal bodies which have succeed to the possession of such property.<sup>166</sup>

In conclusion, while the *Illinois Central* holding is not applicable to upland natural resources, the rules announced by the Court apply broadly to public trust property, not merely to navigable submerged land. While the Court was unwilling to inventory all such property, Justice Field's opinion identified the Plat Act, and thus "streets, alleys [and] ways" in Illinois, as an example of non-submerged public trust land. Justice Field

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<sup>160</sup> *Ill. Cent. R.R. Co.*, 146 U.S. at 458.

<sup>161</sup> *Id.*

<sup>162</sup> See SELVIN, *supra* note 3, at 25.

<sup>163</sup> *Ill. Cent. R.R. Co.*, 146 U.S. at 458.

<sup>164</sup> Joseph K. Angell & Thomas Durfee, *A TREATISE ON THE LAW OF HIGHWAYS* 19 (1886) (emphasis original).

<sup>165</sup> *Townsend v. Greeley*, 72 U.S. 326, 377 (1866).

<sup>166</sup> SELVIN, *supra* note 3, at 214.

specifically cited the Act, consciously copied the Act, and implicitly endorsed the Act by invoking “the most obvious principles of public policy.”

### *C. Application of Illinois Central’s Holding to the Concession Agreement*

Assuming Justice Field intended, or at least anticipated, application of the Court’s holding beyond submerged lands to “streets, alleys, [and] ways” in Illinois, the question arises whether a temporary, non-possessory, lease—which does not impede the public’s right of passage—violates the rules announced by the Court. As discussed in subpart I(B), the Court prohibited a state from “placi[ng]” public trust property “beyond the direction and control of the State,” unless the conveyance served the public interest.<sup>167</sup> Applying this rule, the Court found that “[t]he harbor of Chicago is of immense value to the people of the State of Illinois in the facilities it affords to its vast and constantly increasing commerce.”<sup>168</sup> The Court thus rejected the idea that “placing [it] in the hands of a private corporation created for a different purpose” served the public interest.<sup>169</sup> Interpreting this rule, Professors Merrill and Kearny argue, “What [Justice Field] opposed was what he imagined to be the conferral of a monopoly over the Chicago harbor on a private corporation,” allowing it to engage in “rent-seeking” behavior and “delay indefinitely the development of the harbor.”<sup>170</sup>

On the surface, conveying a non-possessory lease of on-street parking meter infrastructure may not appear to implicate such concerns. Ensuring on-street parking, unlike promoting economic development, is not an essential governmental obligation. Indeed, private parking lots dot Chicago; such lots undoubtedly promote, not impair, commerce. Upon inspection, however, the Concession Agreement mirrors the Lake Front Act in encouraging the stagnation of publicly owned infrastructure essential to Chicago’s economic and urban development, precisely the concerns invoked by Justice Field. Specifically, the Concession Agreement effectively eliminates the city’s ability to substantially redesign, redevelop, or reallocate on-street parking for three generations because “any [such] action at any time” triggers an Adverse Action Concession Compensation Payment equal to Morgan Stanley’s expected, unrealized, and substantial profit.<sup>171</sup> A seventy-five-year commitment to maintaining 36,000 on-street public parking spaces represents a significant impairment of the city’s ability to develop as future generations and technological advances demand—to add bus-only or bicycle lanes, build streetcars, expand the “El” system, extend sidewalks, improve landscaping, or create pedestrian markets or thoroughfares by closing streets to traffic. Morgan Stanley’s position is thus, quintessentially, one of a rent-seeker. The company is specifically prohibited by the Concession Agreement from improving the public rights-of-way, other than installing systems to facilitate the collection of revenues. Yet, the city cannot improve the public rights-of-way or, as Justice Field writes, “do whatever the varying circumstances and present exigencies attending the subject may require,” without

<sup>167</sup> *Ill. Cent. R.R. Co.*, 146 U.S. at 454.

<sup>168</sup> *Id.*

<sup>169</sup> *See also id.* at 452–54.

<sup>170</sup> Kearney & Merrill, *supra* note 3, at 924; *Ill. Cent. R.R. Co.*, 146 U.S. at 451.

<sup>171</sup> *See J. OF THE PROC. OF THE CITY COUNCIL*, *supra* note 25, at 50619; *see also* text accompanying *supra* notes 71–72 and 89–90.



compensating Morgan Stanley.<sup>172</sup> The Agreement thus allows a for-profit corporation, one “created for a different purpose” and obligated to maximize shareholder returns, the right to “delay indefinitely the improvement” of publicly owned infrastructure essential to the general welfare, a result in Justice Field’s judgment “fraught with evil.”<sup>173</sup>

As one example of the redevelopment of municipal rights-of-way, New York City recently installed over 200 miles of bicycle lanes on city streets “much of them created by eliminating parking.”<sup>174</sup> And a little over a year ago the city closed Broadway to vehicle traffic in Times Square and Herald Square, transforming New York’s two busiest shopping and entertainment plazas into pedestrian malls.<sup>175</sup> Critically, the benefits of such transportation reforms are not merely aesthetic. As a consequence of New York’s reforms, “Pedestrian fatalities from collisions with cars are down 19 percent from 2001. Bicycle fatalities are down 54 percent, despite a tripling of the number of bikes on the road since that year.”<sup>176</sup> In fact, in the past two years, “*Fewer people have been killed in traffic accidents on New York’s streets than at any time in the past century, according to city records.*”<sup>177</sup> New York, of course, is not alone. Seattle is eliminating on-street parking spaces to extend its streetcar network.<sup>178</sup> Oakland is proposing to eliminate on-street parking to create a rapid bus transit system.<sup>179</sup> The Concession Agreement represents a significant, if not insurmountable, impediment to such redevelopment of Chicago’s public rights-of-way, “substantial[ly] impair[ing]” the public interest.

The city may argue, reasonably, that the Concession Agreement is distinguishable from the Lake Front Act. Foremost, the city retains title to the property, whereas the Lake Front Act conveyed title in fee simple. Upon inspection, however, this distinction proves irrelevant. In determining whether the Lake Front Act relinquished “management and practical[] control” of a public trust asset, the Court dismissed the mere legal form of a conveyance as immaterial and specifically rejected the distinction between a long-term lease and a conveyance in fee.<sup>180</sup> As discussed in subpart I(A), in enacting the Lake Front Act the legislature sought to protect the public interest by prohibiting the railroad from conveying its ownership in the harbor. Dismissing the significance of this supposed prohibition, Justice Field wrote, “The inhibition against the technical transfer of the fee of

<sup>172</sup> *Ill. Cent.*, 146 U.S. at 459.

<sup>173</sup> *Id.*

<sup>174</sup> Nathaniel Gronewold, *Pedestrians, Bicyclists Spar for Space in NYC’s New No-Car Zones*, N.Y. TIMES, June 8, 2010, <http://www.nytimes.com/gwire/2010/06/08/08greenwire-pedestrians-bicyclists-spar-for-space-in-nycs-n-3563.html>.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> Michael M. Grynbaum, *For City’s Transportation Chief, Kudos and Criticism*, N.Y. TIMES, Mar. 4, 2011, [www.nytimes.com/2011/03/06/nyregion/06sadikkhan.html?ntemail=1&\\_r=1&emc=tnt&pagewanted=all](http://www.nytimes.com/2011/03/06/nyregion/06sadikkhan.html?ntemail=1&_r=1&emc=tnt&pagewanted=all).

<sup>178</sup> Seattle Dept. of Transp., *Environmental Checklist First Hill Streetcar*, <http://www.seattlestreetcar.org/about/docs/sepa/First%20Hill%20Streetcar%20SEPA%20Checklist.pdf> (“[T]he streetcar project would eliminate approximately 48-51 percent of the on-street parking spaces along the proposed alignment . . . [or] between 265 and 279 existing parking spaces.”).

<sup>179</sup> City of Oakland Transp. Serv. Div., *East Bay Bus Rapid Transit (EBRT) Project Design Concept for Study*, [http://www.oaklandnet.com/government/ceda/docs/h10\\_why\\_bike\\_lanes\\_with\\_brt\\_draft.pdf](http://www.oaklandnet.com/government/ceda/docs/h10_why_bike_lanes_with_brt_draft.pdf) (proposing to eliminate between 254 and 387 on-street parking spaces along Telegraph Avenue to establish a bus rapid transit system).

<sup>180</sup> *See Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 451 (1892).

any portion of the submerged lands was of little consequence when it could make a lease for any period and renew it at its pleasure.”<sup>181</sup> Applying Field’s reasoning, any prohibition on the alienation of public trust property is “of little consequence” when a state may subvert it by “mak[ing] a lease for any period and renew[ing] it at its pleasure.”

Additionally, the city may argue Morgan Stanley lacks an exclusive right of possession, and is specifically prohibited from obstructing the public rights-of-way.<sup>182</sup> Again, under the Court’s *Illinois Central* analysis, merely ensuring unimpeded public passage is not sufficient to validate a conveyance of public trust property. Justice Field acknowledged, for instance, that “[the railroad’s] works in no respect interfered with any useful freedom in the use of the waters of the lake for commerce, foreign, interstate or domestic.”<sup>183</sup> Likewise, the dissent noted that “[t]he Lake Front Act had prohibited the railroad from interfering with the public right of navigation and had preserved the power of the State to regulate the railroad’s construction of improvements in the harbor.”<sup>184</sup> Thus, Justice Field is not concerned merely with physically obstructing the channels of commerce. Rather, his concern is the more subtle, and profound, impact of allowing grants of private privilege in vital public infrastructure to retard the city’s continued economic development. Thus, under *Illinois Central*, the differences in mere form between the two conveyances are insufficient to render the Concession Agreement a valid exercise of legislative authority.

#### IV. APPLICATION OF THE PUBLIC TRUST DOCTRINE TO THE CONCESSION AGREEMENT LITIGATION

Part III sought to demonstrate the *Illinois Central* Court considered “streets, alleys, [and] ways” in Illinois as statutorily defined public trust property, subject to the prohibitions governing the conveyance of navigable submerged lands. The question arises, however, whether this interpretation of a century-old opinion is remotely relevant in any meaningful, practical way. To this end, Part IV applies a public trust analysis to the Concession Agreement, utilizing operative Illinois Supreme Court precedent. This analysis introduces a theory, and accompanying case law, unexplored by the parties and court in the current litigation.<sup>185</sup>

<sup>181</sup> *Id.*

<sup>182</sup> Incidentally, this is exactly what the public trust language embedded in the Concession Agreement, *supra* note 25 at 50576, is designed to accomplish—protection of the public right of passage. As demonstrated by *Illinois Central*, however, such minimal protections are not sufficient to render a conveyance of public trust property valid.

<sup>183</sup> *Ill. Cent. R.R. Co.*, 147 U.S. at 444.

<sup>184</sup> *Kearney & Merrill*, *supra* note 3, at 921.

<sup>185</sup> Indeed, neither the plaintiff nor the court has introduced the Plat Act, 765 ILL. COMP. STAT. 205/3 (West 2010), *AT&T Co. v. Arlington Heights*, 620 N.E.2d 1040 (Ill. 1993), or Section 3.19 of the Concession Agreement, J. OF THE PROC. OF THE CITY COUNCIL, *supra* note 25, at 50576. *See* Plaintiff’s First Amended Complaint, *Indep. Voters of Ill. v. Lux*, 09-CH-28993 (Cook Cnty. Ct. filed Aug. 19, 2009); Plaintiff’s Second Amended Complaint, *Indep. Voters of Ill. v. Lux*, 09-CH-28993 (Cook Cnty. Ct. filed Aug. 19, 2009); Plaintiff’s Third Amended Complaint, *Indep. Voters of Ill. v. Lux*, 09-CH-28993 (Cook Cnty. Ct. filed Aug. 19, 2009); Plaintiff’s Memorandum of Law in Opposition to Defendant’s Motion to Dismiss, *Indep. Voters of Ill. v. Lux*, 09-CH-28993 (Cook Cnty. Ct. filed Aug. 19, 2009); Plaintiff’s Memorandum of Law in Opposition to Defendant’s Motion to Dismiss Plaintiff’s Second Amended Complaint, *Indep. Voters of Ill. v. Lux*, 09-CH-28993 (Cook Cnty. Ct. filed Aug. 19, 2009). During the hearing on the defendant’s motion to dismiss, the trial judge noted,

To begin, the public trust doctrine self-evidently governs the Concession Agreement. Specifically, Section 3.19 of the Concession Agreement reads,

The City agrees, and the Concessionaire acknowledges and accepts, that the City holds and administers the public way in trust under the public trust doctrine . . . . In the administration of its public trust with respect to the public way, the City will not take any action in contradiction of the public trust doctrine . . . .<sup>186</sup>

Should the City attempt to argue this contractual provision is superseded or otherwise inoperative, the Agreement further states, “To the extent that any ordinance, resolution, rule, order, or provision of the Municipal Code, or part thereof, is in conflict with the provisions of this ordinance, *the provisions of this ordinance shall be controlling*.”<sup>187</sup>

This contractual provision is consistent with the state Plat Act, discussed in *Illinois Central*. The Plat Act remains substantively identical to the Act as amended in 1845<sup>188</sup> and currently reads, “[T]he premises intended for any street, alley, way, common or other public use in any city, village or town, or addition thereto, shall be held in the corporate name thereof in trust to and for the uses and purposes set forth or intended.”<sup>189</sup>

In subpart II(A), the Note introduced *Quincy v. Jones*, a mid-nineteenth-century Plat Act decision prohibiting a municipality from burdening a public street with private rights to the detriment of the public.<sup>190</sup> Throughout the twentieth century, however, the Illinois Supreme Court continued to strictly construe the Plat Act. For instance, in 1923, in *Chicago v. Chicago Century Railroad Company*, the court refused to recognize the validity of a contractual provision entitling a railroad to compensation when a municipality demanded the company relocate its tracks.<sup>191</sup> An alternative rule, the court concluded, “might forever prevent improvements and development in particular streets and would thereby determine [the municipality’s] growth.” Requiring compensation would “seriously interfere[]” with the “duty of the city to protect the public in its use of the streets, and from time to time, as the community develops, to keep the streets in such condition as will accommodate public safety and convenience.”<sup>192</sup>

The court affirmed this position in 1953 in *Peoples Gas Light & Coke Company v. Chicago*. In a similar factual dispute, the court refused to require the City of Chicago to

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Although the First Amended Complaint contains certain general allegations challenging the Concession Agreement, Plaintiffs explain in their Response and further elaborated during this Hearing that the, quote, main issue here is whether the City’s expenditure of public funds to pay police to issue parking tickets against and boot vehicles that belong to people who have unpaid private debts owed to a private company [sic], close quote. Report of the Proceedings at 62, *Indep. Voters of Ill. v. Lux*, 09-CH-28993 (Cook Cnty. Ct. filed Aug. 19, 2009).

<sup>186</sup> J. OF THE PROC. OF THE CITY COUNCIL, *supra* note 25, at 50576. The authors of the Concession Agreement, while recognizing the relevance of the public trust doctrine, seem to assume merely ensuring public passage satisfies the city’s trust obligations. As discussed in Part II and further explored in Part IV this assumption is contradicted by precedent.

<sup>187</sup> *Id.* at 50525.

<sup>188</sup> See Plat Act, *supra* note 117.

<sup>189</sup> *Id.*

<sup>190</sup> See *Quincy v. Jones*, 76 Ill. 231 (1875).

<sup>191</sup> *Chicago v. Chi. Cent. Ry. Co.*, 324 Ill. 618, 623 (1926).

<sup>192</sup> *Id.* at 623.

compensate a utility for the cost of relocating its sub-street infrastructure, rejecting the utility's claim of a contractual right to payment.<sup>193</sup> The court reasoned,

If the city could not change the grade or the width of its street except upon condition that it make compensation to the railway company, the gas company, the water company, the telephone company, the electric light company and other companies occupying the streets under a contract with the city, for inconvenience and expense thereby occasioned, the duty of the city to protect the public in its use of the streets, and from time to time, as the community develops, to keep the streets in such condition as will accommodate the public safety and convenience, would be seriously interfered with. All corporations thus occupying the streets take their grants from the city upon condition that the city has reserved to it the full and unconditional power to make any reasonable change of grade or other improvement in its streets as the public necessity and convenience demand.<sup>194</sup>

In a 1993 opinion, *Arlington Heights v. AT&T*, the Illinois Supreme Court affirmed the public trust principles underlying *Peoples Gas*.<sup>195</sup> In rejecting the efforts of two home-rule municipalities to profit by “rent[ing]” or “leas[ing]” land beneath city streets to a telecommunications provider, at prices in excess of the municipalities’ “actual costs,” the majority held:

Municipalities do not possess proprietary powers over the public streets. They only possess regulatory powers. The public streets are held in trust for the use of the public. While numerous powers and rights regarding public streets have been granted to municipalities by the General Assembly, they are all regulatory in character, *and do not grant any authority to rent or to lease parts, or all, of a public street.*

....

... The streets exist for the benefit of the entire public and are subject only to reasonable regulations regarding usage. Streets do not exist and were not created as either obstructions or *revenue-producing property for municipalities*.<sup>196</sup>

<sup>193</sup> *Peoples Gas Light & Coke Co. v. Chi.*, 413 Ill. 457 (1953).

<sup>194</sup> *Id.* at 465.

<sup>195</sup> *AT&T Co. v. Arlington Heights*, 156 Ill. 2d 399, 409 (Ill. 1993) (emphasis added); *id.* at 414 (emphasis added).

<sup>196</sup> *Id.* at 409 (emphasis added). Though the rule announced in *Arlington Heights* is directly on-point, the facts underlying the decision are not. In *Arlington Heights*, numerous municipalities threatened to charge AT&T potentially inflated prices for laying cable beneath their streets, rendering such infrastructure improvements prohibitively expensive. Thus, *Arlington Heights* invoked statewide, and not merely intra-city, concerns. It is worth noting, however, that the supreme court in *Peoples Gas* stated:

[A municipality] holds [its streets] in trust for the people of the entire State. So far as their use for street purposes is concerned, every citizen of the State has an equal right. This right of the people in the streets and highways of the state, whether inside or outside

*Arlington Height's* prohibition on the exercise of “proprietary power” is particularly revealing because the *Illinois Central* Court invoked precisely this language. Specifically, Justice Field concluded, “The bed of Lake Michigan . . . [is] not held by the State in *any proprietary or private right*”; rather, the character of the trust is “governmental.”<sup>197</sup> This suggests *Arlington Heights* incorporated public trust principles originally derived from *Illinois Central* into its rules governing the regulation of public streets.

Applying the *Arlington Heights* test, the inquiry becomes: Is the municipality’s action affecting its public streets a “reasonable regulation regarding public usage,” an exercise of its governmental power, or is the action intended primarily to produce revenue, an exercise of “proprietary power”? Here, simply asking the question suggests the answer. The entire purpose of the Concession Agreement was to monetize the revenue streams produced by a particularly lucrative asset—one chosen specifically for its appeal to investors—thus impairing the ability of subsequent councils to exercise “governmental powers” and impose “reasonable regulations,” in accordance with public necessity, safety, and convenience.

In the pending litigation, the city relies extensively, if not exclusively, on the expansive powers provided “home-rule” municipalities by a 1970 amendment to the Illinois constitution.<sup>198</sup> This amendment grants cities such as Chicago “[the] power to perform any function pertaining to its government and affairs including, but not limited to, the power to regulate for the protection of the public health, safety, morals and welfare; to license; to tax; and to incur debt.”<sup>199</sup> Moreover, the Constitution instructs courts to “construe[] [such powers] liberally.”<sup>200</sup> On the strength of this argument the city won a motion to dismiss the plaintiff’s claim that “The Concession Agreement Illegally Leases the City’s Parking Meter System on Public Streets.”<sup>201</sup> The city cited in defense of this position, and the trial court adopted as the basis for its decision, a 1989 Illinois Supreme Court opinion, *Triple A Services v. Rice*, which held that “[h]ome rule units have the same powers as the sovereign, except where such powers are limited by the general assembly.”<sup>202</sup> Thus, the *Rice* court concluded, “Chicago draws its power to

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the municipalities thereof, is a paramount right. The municipality cannot lawfully perform any acts itself nor permit others to do or perform anything in derogation of this right of the sovereign people . . . .

*Peoples Gas*, 413 Ill. at 464.

<sup>197</sup> See *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 444 (1892).

<sup>198</sup> Indeed, the Concession Agreement itself states:

This ordinance is an exercise of the City’s power as a home rule unit of local government under Article VII of the 1970 Constitution of the State of Illinois and is intended to override any conflicting provision of any Illinois statute that does not specifically preempt the exercise of home rule power by the City.

J. OF THE PROC. OF THE CITY COUNCIL., *supra* note 25, at 50526.

<sup>199</sup> ILL. CONST. art. VII, § 6(a).

<sup>200</sup> *Id.* at § 6(m).

<sup>201</sup> See First Amended Complaint at 5, *Indep. Voters of Ill. v. Lux*, No. 09CH-28993 (Cir. Ct. Cook Cnty. 2009).

<sup>202</sup> *Triple A Services v. Rice*, 131 Ill. 2d 217, 230 (1989); see also Report of the Proceedings at 62, *Indep. Voters of Ill. v. Lux*, 09-CH-28993 (Cook Cnty. Ct. filed Aug. 19, 2009) (dismissing the plaintiffs claim because “[h]ome rule units have the authority to contract . . . [and] [t]he matter of parking and the regulation of the City streets are within home rule powers and functions”).

‘regulate for the protection of the public health, safety, morals and welfare’ directly from the constitution.”<sup>203</sup>

The city’s and court’s reliance on the 1970 constitution, however, is misplaced. First, *Arlington Heights*, a 1993 opinion, specifically stated that home-rule municipalities lack proprietary powers over public streets, including the power to “rent or to lease parts, or all, of a public street.” To the extent that the court’s 1989 *Triple A* and 1993 *Arlington Heights* opinions conflict, the latter presumably prevails. Notwithstanding *Arlington Heights*, the city’s reliance on the 1970 constitution fails. Admittedly, under its home-rule authority, Chicago enjoys “the same powers as the sovereign.” *Illinois Central*, however, specifically imposed limits on the power of the sovereign to alienate public trust resources. Indeed, substituting the City of Chicago for the State of Illinois in this context only reinforces the applicability of *Illinois Central* to the litigation. The city cannot rely on the home-rule provisions of the state constitution for authority to alienate public trust resources just as the Illinois legislature could not rely on its supposedly despotic sovereign power to alienate the submerged lands of the Chicago Harbor.

Finally, Plat Act-related decisions, including *Arlington Heights*, represent but one facet of Illinois public trust jurisprudence.<sup>204</sup> Assuming Chicago’s municipal streets are accorded “public trust doctrine” protection, as explicitly stated in the Concession Agreement, a broader survey of Illinois public trust caselaw is appropriate. Relying on Supreme Court precedent, including *Illinois Central*, the Illinois Supreme Court has implicitly adopted a test for determining whether a grant of public trust property violates the public trust doctrine. Under the state doctrine, granting rights in such property is not, per se, impermissible. Rather, the court inquires into whether the grant primarily benefits the general public or a private party. If the latter, the grant violates the doctrine.<sup>205</sup> This

<sup>203</sup> See *Triple A Services*, 131 Ill. 2d at 230.

<sup>204</sup> Illinois courts have interpreted the public trusts articulated in *Illinois Central* and the Plat Act as complementary, if not identical. See *Mamolella v. First Bank of Oak Park*, 97 Ill. App. 3d 579, 582–83 (1981) (noting “[t]he Supreme Court [in *Illinois Central*] also observed that the title to these navigable waters was different in character from the State’s title to other public lands, and that, unlike ordinary land that the State held for sale, the navigable waterways were held in an inalienable public trust. There can be no doubt that the Chicago lakefront has great value to the people of the State of Illinois. Similarly, the public has a strong interest in the preservation of public parks.”); see also *Paepcke v. Public Building Com.* 263 N.E.2d 11 (Ill. 1970) (applying *Illinois Central* to public parks under the Plat Act). In this manner, courts have applied the rules articulated in *Illinois Central* to the disposition of public trust property under the Plat Act.

<sup>205</sup> See *People ex rel. Scott v. Chi. Park Dist.*, 66 Ill. 2d 65, 80 (1976) (rejecting State’s attempt to transfer certain submerged lands to U.S. Steel Corporation and noting “In order to preserve meaning and vitality in the public trust doctrine . . . the public purpose to be served cannot be only incidental and remote. . . . [T]he direct and dominating purpose here would be a private one.”); *Friends of the Parks v. Chi. Park Dist.*, 203 Ill. 2d 312, 328 (2003) (upholding the City Park District’s thirty-year lease of Soldier Field to the Chicago Bears organization and noting “that Soldier Field will continue to be used as a stadium for athletic, artistic, and cultural events. With improved parking, the public will gain better access to the stadium, the museums, and the lakefront generally. The public will now enjoy a fully renovated, multiuse stadium, instead of a deteriorating 78 year-old facility. These results do not violate the public trust doctrine even though the Bears will also benefit from the completed project.”); *Lake Mich. Fed’n v. U.S. Army Corps of Engineers*, 742 F.Supp. 441 (N.D. Ill. 1990) (rejecting transfer of submerged lands in Lake Michigan to Loyola University although “some aspects are beneficial to the public, the primary purpose of the grant is to satisfy a private interest.”); *People ex rel. Attorney Gen. v. Kirk*, 162 Ill. 138, 157 (1896) (upholding transfer of certain submerged lands to private parties to fund construction of Lake Shore Drive because the public’s interest in the lands and waters remaining was not impaired); see also *Lake Mich. Fed’n*, 742 F. Supp. at

fact-intensive inquiry is similar to the test undertaken in *Illinois Central*; indeed, it is undoubtedly derived from *Illinois Central* where Justice Field wrote, “The control of the State for the purposes of the [public] trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining.”<sup>206</sup>

The *Illinois Central* test is admittedly subjective. Here, however, the benefit inures to the private entity, not the general public. The public benefit consists of a cash infusion of \$1.15 billion<sup>207</sup> and modest annual savings associated with transferring revenue collections and system maintenance. This funding allowed the city to delay significant budget cuts or tax increases for approximately two years,<sup>208</sup> an obvious benefit to Chicago’s citizens and employees. This public benefit, however, must be contrasted with the public cost. In sum, the city received “half the value” of the concession rights,<sup>209</sup> parking rates immediately quadrupled on two-thirds of the city’s meters,<sup>210</sup> and the city sacrificed the right to regulate its streets as public safety, necessity and welfare demand, without compensating Morgan Stanley for any profits thus impaired.<sup>211</sup> On the whole, the public benefit is marginal.

Conversely, the Agreement is a boon for private investors. According to *Businessweek*:

Chicago drivers will pay a Morgan Stanley-led partnership at least \$11.6 billion to park at city meters over the next 75 years—10 times what Mayor Richard Daley received when he leased the system for a one-time sum of \$1.15 billion in 2008. The investors . . . may earn a profit of \$9.58 billion before interest, taxes, and depreciation, according to documents for the group’s \$500 million private note sale. Helped along by some aggressive parking-fee hikes, the group is making a profit (before earnings, taxes, and depreciation) equivalent to 80 cents per dollar of projected revenue. Standard Parking, a publicly traded company that runs the parking concession at the city’s O’Hare and Midway airports, earned only 4.84 cents per dollar of revenue last year.<sup>212</sup>

Accordingly, the public is marginally benefitted, if at all, while Morgan Stanley extracts a “windfall.” The Concession Agreement thus violates the Illinois Supreme Court’s contemporary public trust doctrine test.

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444 (“The court [in Kirk] found that the transfer did not violate the public trust doctrine because . . . the project would directly benefit the public.”).

<sup>206</sup> See Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 453 (1892).

<sup>207</sup> See J. OF THE PROC. OF THE CITY COUNCIL, *supra* note 25 at 50508.

<sup>208</sup> See *supra* note 87.

<sup>209</sup> See *Report of Inspector General*, *supra* note 19, at 2.

<sup>210</sup> Dan Mihalopoulos, *Parking Meter Fees to Quadruple*, CHI. BREAKING NEWS (Dec. 2, 2008), <http://www.chicagobreakingnews.com/2008/12/parking-meter-fees-to-quadruple.html>.

<sup>211</sup> See discussion *supra* Part II, par. 1–3.

<sup>212</sup> Preston, *supra* note 100.

## CONCLUSION

Private investors are increasingly seeking monopolistic property rights in publicly owned infrastructure. The monopoly sought by such institutions consists not of an exclusive possessory right, but of an “exclusive right and franchise” to revenues derived from the asset. This phenomenon recalls the efforts of nineteenth-century railroad corporations to acquire special privileges in public streets and harbors, conveyances which ostensibly protected the public interest by ensuring continued public access to the encumbered asset. In the “lodestar” of the modern public trust doctrine, *Illinois Central*, the Supreme Court prevented a railroad corporation from acquiring monopolistic property rights in a “common highway for commerce, trade and intercourse,” despite the public’s continued right of passage over the property.<sup>213</sup> The grant, in the Court’s judgment, empowered a private party indifferent to public safety and welfare to engage in profit-maximizing, rent-seeking behavior and thus “delay indefinitely the improvement” of essential public infrastructure. The recent Chicago Parking Meter Concession Agreement invokes precisely such concerns. By allocating to Morgan Stanley an exclusive, monopolistic right to revenues derived from the parking meter system, and requiring the city to pay substantial premiums for the right to exercise regulatory powers in accordance with public necessity, the Concession Agreement encourages the stagnation of publicly owned infrastructure vital to Chicago’s economic and urban development. To this end, *Illinois Central* specifically, and the public trust doctrine generally, maintain tremendous potential to proscribe infrastructure privatizations which demonstrably impair the public interest.

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<sup>213</sup> Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 458 (1892).



## APPENDIX

*Selected Concession Agreement Provisions*

An "Adverse Action" shall occur if the City, the County of Cook or the State of Illinois (or any subdivision or agency of any of the foregoing) takes any action or actions at any time during the Term (including enacting any Law) and the effect of such action or actions, individually or in the aggregate, is reasonably expected (i) to be principally borne by the Concessionaire or other operators of on-street metered parking systems and (ii) to have a material adverse effect on the fair market value of the Concessionaire Interest (whether as a result of decreased revenues, increased expenses or both), except where such action is in response to any act or omission on the part of the Concessionaire that is illegal (other than an act or omission rendered illegal by virtue of the Adverse Action) or such action is otherwise permitted under this Agreement; provided, however, that none of the following shall be an Adverse Action: (A) any action taken by the City pursuant to its Reserved Powers, (B) other than as a result of any action taken by the City pursuant to its Reserved Powers, the development, redevelopment, construction, maintenance, modification or change in the operation of any existing or new parking facility or mode of parking or of transportation (including a road, street or highway) whether or not it results in the reduction of Metered Parking Revenues or in the number of vehicles using the Metered Parking System, (C) the imposition of a Tax of general application or an increase in Taxes of general application, including parking Taxes of general application imposed on customers or operators of parking facilities, or (D) requirements generally applicable to public parking lot licensees including "public garage-not enclosed" licensees under the Municipal Code. (b) If an Adverse Action occurs, the Concessionaire shall have the right to (i) be paid by the City the Concession Compensation with respect thereto (such Concession Compensation, the "AA-Compensation") or (ii) terminate this Agreement and be paid by the City the Metered Parking System Concession Value, in either case by giving notice in the manner described in Section 14.1(c).<sup>214</sup>

\* \* \*

Compensation Event. "Compensation Event" means the Concessionaire's compliance with or the implementation of any City Directive or any modified or changed Operating Standard subject to Section 6.3(b), the occurrence of an Adverse Action or the occurrence of any other event that under the terms of this Agreement explicitly requires the payment of Concession Compensation . . . . 'Concession Compensation' means compensation payable by the City to the Concessionaire in order to restore the Concessionaire to same economic position the Concessionaire would have enjoyed if the applicable Compensation Event had not occurred, which compensation shall be equal to the sum of (i) all Losses (including increased operating, financing, capital and maintenance costs but excluding any costs and expenses that the Concessionaire would otherwise expend or incur in order to comply with this Agreement or in the ordinary course of the performance of the Metered Parking System Operations or the carrying on of business in the ordinary course) that are reasonably attributable to such Compensation Event plus (ii)

<sup>214</sup> J. OF THE PROC. OF THE CITY COUNCIL, *supra* note 25 at 50619.

the actual and estimated net losses (after giving effect, to the extent applicable, to any increase in revenues, including Metered Parking Revenues that are attributable to such Compensation Event) of the Concessionaire's present and future Metered Parking Revenues that are reasonably attributable to such Compensation Event; *provided, however*, that, unless otherwise specified in this Agreement, any claim for Concession Compensation shall be made within 120 Days of the date that the Concessionaire first became aware of such Compensation Event. Any Concession Compensation payable with respect to Losses or lost Metered Parking Revenues (or other revenues) that will occur in the future shall be payable at the time such Compensation Event occurs based on a reasonable determination of the net present value of the impact of such Compensation Event (i) over the period ending on February 28, 2015 in the case of the Compensation Event described in Section 7.1 and (ii) over the remainder of the Term in the case of any other Compensation Event.<sup>215</sup>

\* \* \*

Required Closure Allowance. "Required Closure Allowance" means (i) with respect to a particular Concession Metered Parking Space located within the Central Business District and a particular Reporting Year, eight percent (8%) of the number of Days during such Reporting Year that such Concession Metered Parking Space was a designated Concession Metered Parking Space for Metered Parking System Operations, and (ii) with respect to a particular Concession Metered Parking Space not located within the Central Business District and a particular Reporting Year, four percent (4%) of the number of Days during such Reporting Year that such Concession Metered Parking Space was a designated Concession Metered Parking Space for Metered Parking System Operations and in either case based upon the assumption that such Concession Metered Parking Space will continue to be a Concession Metered Parking Space for the remainder of such Reporting Year.<sup>216</sup>

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Required Closure Payment. "Required Closure Payment" means, with respect to a Concession Metered Parking Space and for the Quarter during which the Required Closure Allowance for the Reporting Year is first exceeded and for each subsequent Quarter during the Reporting Year, an amount of money equal to twenty-five percent (25%) of the weighted average Revenue Value of such Concession Metered Parking Space during the Reporting Year multiplied by a fraction the numerator of which is the number of Days in such Quarter that such Concession Metered Parking Space was closed as a result of a Required Closure after the date the Required Closure Allowance for such Reporting Year was fully applied and the denominator of which is the number of Days that such Concession Metered Parking Space was so designated during such Quarter as a Concession Metered Parking Space for Metered Parking System Operations, all based upon the assumption that such Concession Metered Parking Space will continue to be a

<sup>215</sup> *Id.* at 50533 (emphasis in original).

<sup>216</sup> *Id.* at 50548.

Concession Metered Parking Space with its then current Revenue Value for the remainder of such Reporting Year.<sup>217</sup>

\* \* \*

Reserved Powers. “Reserved Powers” means the exercise by the City of those police and regulatory powers with respect to Metered Parking Spaces, including Concession Metered Parking Spaces and Reserve Metered Parking Spaces, and the regulation of traffic, traffic control and the use of the public way including the exclusive and reserved rights of the City to (i) designate the number and location of Metered Parking Spaces and to add and remove Metered Parking Spaces; (ii) establish and revise from time to time the schedule of Metered Parking Fees for the use of Metered Parking Spaces; (iii) establish and revise from time to time the Periods of Operation and Periods of Stay of Metered Parking Spaces; (iv) establish a schedule of fines for parking violations; (v) administer a system for the adjudication and enforcement of parking violations and the collection of parking violation fines and (vi) establish and administer peak period pricing, congestion pricing or other similar plans.<sup>218</sup>

\* \* \*

Use of Reserved Powers. The Parties acknowledge and agree that (i) it is anticipated that the City will exercise its Reserved Powers during the Term, (ii) the impact of certain of such actions may have a material adverse effect on the fair market value of the Concessionaire Interest; (iii) the provisions of Article 7, including the provisions thereof relating to the payment of Settlement Amounts by the City, are designed to compensate the Concessionaire for changes resulting from the exercise by the City of its Reserved Powers in a manner that will maintain the fair market value of the Concessionaire Interest over the Term and (iv) adverse changes may be mitigated by other Reserved Power actions of the City that will have a favorable impact on the fair market value of the Concessionaire Interest. The Parties also acknowledge and agree that there may be circumstances when the exercise by the City of its Reserved Powers may have a material adverse effect on the fair market value of the Concessionaire Interest that cannot be compensated fully under the provisions of Article 7 and that under such circumstances the Concessionaire may seek compensation with respect thereto (the ‘Reserved Powers Adverse Action Compensation’).<sup>219</sup>

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<sup>217</sup> *Id.* at 50549.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.* at 50621.